91-1625

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE CAIN PARTNERSHIP, LTD.,
Petitioner,

vs.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK NATIONAL ASSOCIATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is the 28 U.S.C. § 157(b)(3) congressional grant of jurisdiction, to a non-Article III bankruptcy judge, to determine whether it or an Article III district judge must adjudicate the merits of a proceeding, a violation of Article III of the Constitution?

2. Is a general delegation, pursuant to 28 U.S.C. § 157(b)(1), by an Article III judge of her/his jurisdiction to a non-Article III bankruptcy judge, with instruction to hear and determine a state law lease dispute, even though classifiable as a "core proceeding" under 28 U.S.C. § 157(b)(2)(A), (G) and (O), a violation of Article III of the Constitution?

3. If the answer to Question No. 2 is "yes," is it constitutionally possible for the non-Article III bankruptcy judge to obtain otherwise non-existent jurisdiction by consent of the parties?

4. If the answer to Question No. 3 is "yes," is it constitutionally possible for the consent [i.e., the consent envisioned by 28 U.S.C. § 157(c)(2)] to be implied only?

5. Is the filing by a landlord, in bankruptcy court, of a motion to lift the automatic stay in place because of 11 U.S.C. § 362(a), claiming that the debtor's assertion that the subject leasehold is "property" of the bankruptcy estate is false, an objection to federal (not just bankruptcy court) jurisdiction, since such federal jurisdiction extends only to the "property" of the debtor?

6. If the answer to Question No. 5 is "yes," is it constitutionally permissible for the objection so made, subsequently, to be deemed, for the first time, by the court of appeals, to have been waived by consent implied merely from the fact that the party aggrieved did not express in some additional way [other than a motion pursuant to *Federal Rules of Civil Procedure*, Rule 60(b)(4) after an

appeal was pending but before consideration by the court of appeals] an objection to jurisdiction?

7. After a bankruptcy court rules that a "proceeding" is "core" and a district court, on appeal, affirms, is the court of appeals free, for the first time, to declare that the "proceeding" was "non-core" yet affirm the judgment below (on a finding of implied consent) even though the appellant was never given the opportunity to make elections and motions which would have presented themselves in the bankruptcy court had the "non-core" ruling emanated from the bankruptcy court as anticipated by 28 U.S.C. § 157(c)(2)?

8. Has a "taking" of real property, in violation of the Fifth Amendment to the Constitution, occurred when a non-Article III bankruptcy judge (in response to a motion by the owner challenging the right of a bankrupt tenant to continue in possession), fails, for a period greater than is required to provide reasonable notice of hearing on said motion, to lift the automatic stay, which keeps the owner from his property, in order to make possible an adjudication of the owner's claim by a tribunal presided over by a non-Article III judge?

PARTIES*

The Cain Partnership, Ltd., petitioner, has no parent or subsidiary company, and has no knowledge of parent companies or subsidiaries of respondents, Pioneer Investment Services Co., Fleet National Bank, First National Bank of Louisville. The parent company of First Tennessee Bank National Association, upon information and belief, is First Tennessee National Corporation.

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* Since the constitutionality of an Act of Congress is drawn in question by this petition, 28 U.S.C. § 2403(a) may be applicable; upon information and belief, certification of this fact, pursuant to 28 U.S.C. § 2403(a), to the Attorney General has not been made.

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[2] D.C. — U.S. District Court for the Eastern District of Tennessee, Northern Division.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, The Cain Partnership, Ltd. ("Cain") respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

CITATION TO OPINIONS BELOW

The Amended Opinion of the United States Court of Appeals for the Sixth Circuit in Case Nos. 90-5766/6578 (App.Z), although recommended for full text publication, appears to be reported only unofficially at this time as *The Cain Partnership, Ltd.* v. *Pioneer Investment Services Company*,

at Bankr. L. Rep. (CCH) ¶ 74,312, (6th Cir. 1991), *amending* 946 F.2d 445, 22 Bankr. Ct. Dec. (CRR) 118 (opinion withdrawn) (App. V). The Sixth Circuit opinion denying rehearing is reported unofficially at 1991 U.S. App. LEXIS 31363 (6th Cir. 1991) (App. BB). All other opinions and orders appear to be unreported.

JURISDICTION

The Amended Judgment of the Sixth Circuit was filed October 28, 1991. (App. AA). A petition for rehearing, with a suggestion for a rehearing en banc, was denied on December 19, 1991 (App. BB). This Court on March 2, 1992, entered an order extending the time for filing a petition for writ of certiorari until April 7, 1992 (App.DD). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. art. III, § 1, set forth in App. EE.
U.S. Const. amend V and X, set forth in App. EE.
28 U.S.C. § 1334(a)-(d), set forth in App. EE.
28 U.S.C. § 157(b)(1)-(4), and (c), set forth in App. EE.

I. STATEMENT OF THE CASE

A. INTRODUCTION.

As more specifically set forth in § I.B., the bankruptcy judge below assumed jurisdiction over Cain's property and adjudicated, as a "core proceeding," a dispute as to whether state law had terminated the debtor's lease of the property. The district court affirmed on appeal. The Sixth Circuit, in the face of a constitutional challenge by Cain to the jurisdiction of the non-Article III bankruptcy judge, ruled that the dictates of *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) prohibited the proceeding from being classified as "core," but transformed the "proceeding" after the fact into a "non-core" proceeding and conferred jurisdiction on the bankruptcy judge by implying Cain's consent pursuant to 28 U.S.C. § 157(c)(2).

This case raises the important federal question following this Court's decision in *Northern Pipeline:* Did the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA") cure the constitutional defects in the jurisdictional provisions of the Bankruptcy Reform Act of 1978 (the "Reform Act") which this Court declared unconstitutional in *Northern Pipeline*? Respectfully, this issue alone would justify granting this petititon; but there is more, making this case particularly appropriate for review.

By finding that jurisdiction existed in the bankruptcy court below, the Sixth Circuit did decide federal questions in conflict with this Court's decisions and implicitly decided important issues which have not been settled by this Court. Nevertheless, it is the reasoning of the Sixth Circuit in conflict with other circuits on the issue of whether "consent" under 28 U.S.C. § 157(c)(2) may be implied, as well as a manipulation of the record on appeal to find consent, which represents a departure from the accepted and usual course of judicial proceedings, which stand out as the most obvious reasons for granting this petition.

This Court spoke strongly once before on the limits of the jurisdiction of a non-Article III bankruptcy judge, in *Northern Pipeline*, although without the unity which would have provided clearer guidance. Congress, rather than making bankruptcy judges Article III judges, enacted BAFJA, which, rather than limiting bankruptcy jurisdiction, may have expanded it. The Court is urged to speak again.

B. STATEMENT OF THE FACTS

This litigation began with a lease dispute between Cain and Pioneer Investment Services Company, the debtor-in-possession ("Pioneer"), which erupted in bankruptcy court when Pioneer listed an interest in Cain's property, a large tract of commercial real estate in Knoxville, Tennessee, worth in excess of twenty million dollars (the "Property"),[1] as an asset to be used in its reorganization pursuant to 11 U.S.C. § 101 *et seq*. Pioneer claimed a right to use of the major portion of the Property pursuant to a leasehold interest which had been conveyed to Pioneer.[2]

Cain is lessor of the Property and has been for years prior to this litigation. The Property was leased years earlier to Colonial Enterprises, Inc. ("Colonial"). That leasehold ("Colonial Lease" or "head lease") covered approximately 95.5 acres which was later reduced to 93.85 acres. Pioneer obtained an interest as an undertenant through another undertenant of Colonial, Permiere Investment Properties, Inc. ("Premiere").[3] Pioneer subleased the Property further.

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[1] Cain was treated for all purposes below as the owner of the Property (See App. D, p. 35a.).

[2] The precise nature of the interest was one of the many issues disputed by Cain and is immaterial for purposes of this petition, since this petition does not deal with the substantive issues of state contract and real property law out of which the rights adjudicated below were created, but to the subject matter jurisdiction of the non-Article III bankruptcy judge.

[3] The word "undertenant" is a term borrowed from the authorities which were material to the resolution of the lease dispute below (see footnote 6, *infra*, p. 5).

Prior to Pioneer obtaining an interest, Colonial had carved out and conveyed an interest in a 5.71 acre tract subject to the head lease to Omie, Inc., who conveyed it to Orange Tee.[4]

Prior to the filing of the petition, the Colonial Lease was terminally breached by Pioneer's failure to pay property taxes on numerous occasions and by Orange Tee's unlawful activities.[5] A dispute arose when Cain refused to issue an estoppel certificate to Pioneer, and, on April 12, 1989, Pioneer filed its petition for reorganization under Chapter 11. On May 25, 1989, Pioneer listed an interest pursuant to the Colonial Lease on an Amended Schedule of Assets.

Faced with the automatic stay that stays the commencement of an action against the debtor [11 U.S.C. § 362(a)(1)] and prohibits "any act to obtain possession of property of the estate or property from the estate or to exercise control over property of the estate" [11 U.S.C. § 362 (a)(3)], that same day, Cain filed a motion to lift the stay. Cain did *not* file a claim against the estate but challenged Pioneer's depiction of the estate itself.

In response to Pioneer's assertion of an intersest under the Colonial Lease, Cain argued that, in accordance with the common law of Tennessee, the Colonial Lease had terminated pre-petition through Pioneer's own breaches and the unlawful use by Orange Tee, in breach of indivisible covenants of the head lease, resulting in termination of all subordinate interests, including Pioneer's, which is the law in Tennessee adopted from the common law of England via the Tennessee Constitution.[6] Cain argued that the interest

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[4] There were other conveyances at issue below and many issues regarding the terms thereof. Over thirty possible state common law contract and real property issues were identified, *see App. A*, affecting creation of the material relationships, but the above sufficiently summarizes the material relationships for purposes of this petition.

[5] These were Cain's contentions, which were disputed by Pioneer.

[6] See *Jay* v. *Bennett*, 21 N.Y. Sup. Ct. Rpt. 63, 14 Hunley 8 (1878); *Brett* v. *Cumberland*, 79 Eng. Rept. (Full Reprint) 445, Croke and Jac. 522

claimed by Pioneer was not property of the estate and sought to lift the stay to regain its property. Pioneer took an adverse position with respect to termination, and, therefore, upon the filing of the motion to lift the stay, Cain was forced to litigate the lease termination dispute before a bankruptcy judge, and what followed is the subject of this case.[7]

The issue before the bankruptcy judge was whether the property interest claimed by Pioneer was "property of the estate."A fundamental basis for federal jurisdiction in a bankruptcy case is the exclusive jurisdiction in the district court over debtor's property. 28 U.S.C. § 1334(d). If the interest claimed by Pioneer terminated pre-petition, then, there was nothing of Cain's in the estate other than, at most, a "tenancy-at-sufferance."

From the moment Pioneer scheduled an interest in the Property, Cain overtly challenged the basis for jurisdiction over Pioneer's claim, and the bankruptcy judge understood Cain's position as a frontal assault to the court's jurisdiction (*See* App. P and O). Nevertheless, the bankruptcy judge entered an express ruling that the proceeding was a "core proceeding" under 28 U.S.C. §§ 157 (b)(2)(A), i.e., "matters concerning administration of the estate;" (G),[8] i.e., "motions

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(1654); *Webber* v. *Smith*, 2 Vern. 103 [1] Eq.Ca.Ab. 115, pl.14 S.C. (1689); *Norton* v. *Acklane*, 79 Eng. Rept. 1097, Croke and Car. 580 (1654); *Bachelour* v. *Gage*, 79 Eng. Rept. 768, Croke Car. 188 (1684); 51 *C.J.S.* § 46 p.138, § 47 p.140, § 48(1) pp.140-142; 49 *Am.Jur.2d*, Landlord and Tenant § 508-§ 512 pp.487-491; 1 *Friedman on Leases* (2nd ed. 1983) § 7.703 pp.329-330; 1 *Tiffany On Real Property* (3rd ed. 1939) § 153 p.247; Cribbet, *Principles of the Law of Real Property* (2nd ed. 1975) pp.220-221; 2 *Powell On Real Property* (1990 ed.) ¶222[7][d] pp.16-84 through 16-85; *Walgreen Co.* v. *Walton*, 64 S.W.2d 44, 48 (Tenn.App. 1932), *cert. den.* July 19, 1933; *Anderson* v. *Miller*, 96 Tenn. 34 (1896).

[7] A motion by Pioneer to assume the lease was also before the court, the resolution of which was necessarily dependent upon resolution of the stay motion.

[8] The Sixth Circuit unexplainably substituted 28 U.S.C. § 157(b)(2)(E)

to terminate, annul, or modify the automatic stay;" and (O), i.e., "other proceedings affecting the liquidation of the assets of the estate. . . ."

Cain was not given an opportunity by the bankruptcy judge to express a position with respect to whether the proceeding was "core" or "non-core," or with respect to consent. In fact, the first indication of the bankruptcy judge's view with respect to the nature of the proceeding was in the memorandum opinion adjudicating the lease dispute (App. B, p. 9a), entered months after Cain filed its motion to lift the stay.

The litigation below culminated with the final order adjudicating that the Colonial Lease had not terminated prepetition under Tennessee law (App. C). There was no federal rule of decision and the sole basis for adjudication by the bankruptcy court was that Pioneer had filed schedules in bankruptcy, listing an interest in Cain's Property as an asset of its estate (App. Z, p. 113a). In the face of the automatic stay, Cain had no choice but to seek relief in bankruptcy or risk contempt of court for violating the automatic stay. The bankruptcy court heard and determined the lease controversy in accordance with 28 U.S.C. § 157(b)(1) and ruled in Pioneer's favor (App. B). Cain appealed pursuant to 28 U.S.C. § 158 to the district court, and the district court affirmed on March 8, 1990 (App. E). A motion to amend the judgment was denied by the district court on May 23, 1990. (App. G).

The appeal to the Sixth Circuit was docketed as Case No. 90-5766. While that appeal was pending, Cain, upon researching in response to positions being asserted by opposing parties, was enlightened more fully with respect to the

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for § 157(b)(2)(G) (*See* App. Z, p. 112a). Cain pointed this out, but the Sixth Circuit chose not to address the issue.

jurisdictional significance of the adjudication below, which led to *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33 (1989), decided after the bankruptcy court's disposition of Cain's motion,[9] which was the first hint of the Supreme Court's views of the jurisidictional scheme under BAFJA.

Cain filed motions, pursuant to *Fed.R.Civ.P.*, Rules 60(b)(4) and 12(h)(3), in the bankruptcy court and the district court, seeking vacation of both courts' orders for lack of subject matter jurisdiction. During a hearing on Cain's motion, the banktruptcy judge expressed frustration because of the judge's view that jurisdiction had always been the issue (*see* App. O and P). The judge reaffirmed that he did possess jurisdiction and denied the motion (App. I and H). That order was appealed to the district court where it was held in abeyance until denied (App. CC). The motion in the district court was also denied (App. K), and this order was appealed to the Sixth Circuit and docketed as Case No. 90-6578 and consolidated with Case No. 90-5766 (*see* App. M); in its opinion, the district court acknowledged the jurisdictional issue below and affirmed the ruling below that the proceeding was "core." (App. J., pp. 69a-71a).

On appeal to the Sixth Circuit,[10] Cain challenged the jurisdiction of the bankruptcy judge over the lease dispute notwithstanding that the proceeding was a "core proceeding" under the language of § 157(b)(2)(A), (G) and (O).[11] Pioneer

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[9] This Court's reasoning on the timing of raising Art. III issues in *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985) is pertinent. In *Thomas*, the Art. III challenge by Stauffer Chemical was not raised until, in a separate lawsuit after the challenged adjudication concluded, and not even in the lawsuit until after *Northern Pipeline* was decided.

[10] Since Case No. 90-6578 challenges the subject matter jurisdiction of the bankruptcy court in Case No. 90-5766, and a reversal of the former would necessarily result in reversal of the latter, review is sought as to both.

[11] Cain also argued that this Court's decision in *Cline* v. *Kaplan*, 323 U.S. 97 (1944), as well as a Sixth Circuit case, *In re: F&T Contractors, Inc.*, 718 F.2d 171 (6th Cir. 1983), required reversal of the court below because

argued "non-core" consent principles which seemed specious since there was no ruling below that the proceeding was "non-core."[12] Pioneer cited neither *Northern Pipeline* nor Article III.

The Sixth Circuit agreed that *Northern Pipeline* required a "strict reading" of "core" (App. Z, p. 112a,n.2), reasoning that "[s]ignificant jurisdictional consequences flow from this distinction [between "core" and "non-core"]." (App. Z, p. 113a) The Sixth Circuit thus acknowledged that the adjudication by the bankruptcy judge of the lease dispute as a "core proceeding" conflicted with *Northern Pipeline*, as reflected in its statement at App. Z, n.3, p. 113a:

> Appellant's motion is based on rights which could have been brought in state court had there been no title 11 bankruptcy case filed. In other words, the questions as to the automatic termination of the lease upon

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of the dispute over Pioneer's claimed interest. The Sixth Circuit ignored the argument altogether. Cain suggests that the principles in those cases are implicitly based on constitutional principles and are particularly applicable in this case.

[12] Pioneer also argued that Cain expressly consented to jurisdiction in the pre-argument cover sheet to Case No. 90-5766 which goes to the conference attorney to facilitate administration and possible settlement. The statement was: ". . . *to appellant's knowledge*, there are no issues with respect to jurisdiction." The cover sheet is filled out with its purposes in mind, and is not intended to incorporate the positions of the parties. As stated above, *infra* at p.9, at the time of the docketing of the first appeal, Cain's knowledge regarding the Article III issue was limited. This Court had not decided *Granfinanciera* until sometime after the proceeding began, and had not even hinted that the jurisdictional provisions of BAFJA may also be suspect under Article III. The Sixth Circuit was, at first, persuaded and cited the statement as a basis for its first opinion that Cain had "impliedly or expressly consented." But, without detailing the history that followed, the Sixth Circuit acting without the need for a formal motion, subsequently rejected that basis for its decision, recalled the mandate (App. X), and amended its opinion accordingly (App. Y and Z). Reliance upon civil cover sheets compromises the advice of the conference attorneys to parties regarding their significance, especially since there is no provision for amendment.

> breach did not involve any rights of either party granted by virtue of the filing of a title 11 bankruptcy case. Such a strict reading of "core" is necessitated by the Supreme Court's holding in *Marathon*.

The Sixth Circuit, instead of resolving the conflict, bypassed it by analyzing the proceeding below as if it had been ruled "non-core." The Sixth Circuit said nothing futher about the actual ruling as below, and ruled as follows, App. Z, p. 114a:

> The actions of appellant amount to an implied consent to have the Bankruptcy Court hear and determine *the instant non-core proceeding.* (emphasis added).

Again, the Sixth Circuit held, *id.* at p. 115a:

> Under these circumstances, we conclude that the Partnership implicitly, if not expressly, consented to the jurisdiction of the Bankruptcy Court to hear and determine *this non-core but related proceeding.* (emphasis added)

Finding consent, the Sixth Circuit affirmed the denial of the Rule 60(b)(4) motion, reached the state law issues and affirmed the district court's decision. Cain's petition for rehearing with a suggestion for a rehearing en banc, raising the issues identified by this petition, was denied (App. Z).

II. REASONS FOR GRANTING WRIT OF CERTIORARI

The more obvious reasons for granting this petition are the conflict with other circuits on the issue of whether consent under 28 U.S.C. § 157(c)(2) may be implied, and the way in which the Sixth Circuit manipulated the record on appeal to find consent. These reasons, however, mask the more fundamental error of the Sixth Circuit in failing to follow through with the necessary result of its reasoning which will, therefore, be addressed first.

A. THE SIXTH CIRCUIT DECIDED AN IMPORTANT FEDERAL QUESTION IN CONFLICT WITH DECISIONS OF THIS COURT AND IMPORTANT ISSUES OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Sixth Circuit correctly reasoned that the bankruptcy judge below could not, consistent with *Northern Pipeline*, enter a final order in Cain's lease dispute, notwithstanding that it arose in a "core proceeding." The Sixth Circuit stopped short, however, of the necessary result of its reasoning and failed to declare the jurisdictional grant to bankruptcy judges unconstitutional as violating Article III. Although the reasoning of this Court in *Granfinanciera* suggests that BAFJA may be defective in light of *Northern Pipeline*, the Court did not have occasion therein to so hold. This case presents that occasion.

The words of Article III are simple enough:

> The judicial Power of the United States, shall be vested in one supreme Court, an in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Article III guarantees that the judicial power of the United States be exercised only by Judges with life tenure and irreducible compensation. *Northern Pipeline*, 458 U.S. at 57.

Counseled by their own experiences of oppression at the hands of unrestrained authority, the Framers determined never again to be subject to a system of government in which power was centralized without accountability, as indicated by the following statement in *Northern Pipeline*, *id.*:

> Basic to the constitutional structure established by the Framers was the recognition that "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elected, may justly be pronounced the very definition of tyranny."

The Framers, therefore, separated government into the three branches — legislative, executive and judiciary — and constitutionally secured the outside limits on the power of each. No doubt such restraint would encumber the exercise of governmental power, but the Framers chose to sacrifice convenience in exchange for a guarantee of liberty.

One of the rudimentary checks and balances was the independence of the judiciary. *Id.* at 58. It was so crucial for those in whom judicial power would be vested to be free from influence that the Framers guaranteed independence by constitutionally mandating that those judges not be subject to removal easily or salary reduction, throughout their lifetime. Appreciation for the convictions that compelled the Framers to guarantee permanent restraints on the delegation of power and for their salutary effects to this day, may have waned by the remoteness in time of the events that forged those convictions; but, fortunately, the language of the Constitution has not.

Article III specifically guarantees that no branch but the judiciary will exercise judicial power and precludes the transfer of judical power to a non-Article III decision-maker by an act of the legislature and alienation by the judicial

branch of its own powers. *Peretz* v. *United States*, 501 U.S. ____, 115 L.Ed.2d 808, 835, 111 S.Ct. 2661 (1991) (Scalia, J., dissenting). The interests served by Article III are "structural" and of subject matter jurisdictional significance. *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. 833, 850 (1986); *Freytag* v. *Commissioner*, 501 U.S. ____, 115 L.Ed.2d 764, 111 S.Ct. 2631 (1991) (Scalia, J., concurring). The litigants cannot be expected to protect them, and issues of consent or waiver are immaterial. *Schor*, 478 U.S. at 851. The independent judiciary must be jealously guarded. *Northern Pipeline*, 458 U.S. at 60. It is in this light that the evolution of bankruptcy jurisdiction must be examined.

The Bankruptcy Act of 1898 (the "Act") was unsatisfactory because of its limited jurisdictional reach, and the Reform Act was an effort to expand that jurisdiction (See *1 Collier on Bankruptcy*, ¶ 3.01[a]). Thus, bankruptcy judges were delegated all of the power of the district court over proceedings in bankruptcy, under former 28 U.S.C. §§ 1471-1482. Bankruptcy judges were empowered to adjudicate traditional state law claims related to the bankruptcy subject only to traditional appellate review in the district courts. That broad jurisdictional grant was declared unconstitutional in *Northern Pipeline*.

A plurality of Justices, in *Northern Pipeline*, reasoned that "matters from their nature subject to a suit at common law or in equity or admiralty" or "state-created private rights," 458 U.S. at 71, lie at the "protected core" of Article III judicial power. 458 U.S. at 70, n.25. Therefore, the final adjudication of contract disputes arising out of state law could not be delegated to a decision-maker lacking the attributes of Article III such as a bankruptcy judge.

A majority concurred in the judgment, but the concurring Justices did not adopt the plurality's analysis reasoning as follows, *id.* at 91:

> None of the cases has gone so far as to sanction the type of adjudication to which Marathon will be sub-

> jected against its will under the provisions of the 1978 Act. To whatever extent different powers granted under that Act might be sustained under the "public rights" doctrine of *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How 272, 15 L.Ed. 372 (1856), and succeeding cases, I am satisfied that the adjudication of Northern's lawsuit cannot be so sustained.

Viewing appellate review by the district court as insufficient to save the Reform Act's grant of authority to the bankruptcy court to resolve "all matters of fact and law . . . in the first instance," the concurring Justices stated, *id.*:

> I would, therefore, hold so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's lawsuit over Marathon's objection to be violative of Article III of the United States Constitution.

More recently a majority of the Court, in *Granfinanciera*, 492 U.S. at 55-56, cited the following reasoning of the plurality in *Northern Pipeline* with approval:

> In *Northern Pipeline Construction Co.*, 458 U.S. at 71, the plurality noted that the restructuring of debtor-creditor relations in bankruptcy "may well be a 'public right,' " n.11 But the plurality also emphasized that state-law causes of action for breach of contract or warranty are paradigmatic private rights, even when asserted by an insolvent corporation in the midst of Chapter 11 reorganization proceedings. The plurality further said that "matters from their nature subject to 'a suit at common law or in equity or admiralty' " lie at the "protected core" of Article III judicial power, id., at 71, n 25, 73 L.Ed.2d 598, 102 S.Ct. 2858; see id., at 90, 73 L.Ed.2d 598, 102 S.Ct. 2858 (Rehnquist, J., concurring in judgment) — a point we reaffirmed in *Thomas*, *supra*, at 598, 87

> L.Ed. 409, 105 S.Ct. 3325. There can be little doubt that fraudulent conveyance actions by bankruptcy trustees — suits which, we said in *Schoenthal* v. *Irving Trust Co.*, 287 U.S., at 94-95, 77 L.Ed.2d 185, 53 S.Ct. 50 (citation omitted), "constitute no part of the proceedings in bankruptcy but concern controversies arising out of it" — are quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res. See Gibson 1022-1025. They therefore appear matters of private rather than public right.

There is, therefore, one clear theme that enjoys the support of a majority of the Court; that is, there is a "protected core" of Article III judicial power into which a non-Article III bankruptcy judge is not permitted to venture. It is that Article III "core" against which BAFJA must be measured.

It took more than two years for Congress to enact legislation in response to *Northern Pipeline*. While Congress debated, bankruptcy proceedings were adjudicated in accordance with an Emergency Rule.[13] Proposals in the House of Representatives that would have solved the problem by conforming bankruptcy judges to Article III were strenuously opposed, *see* Countryman, *infra*, n.18, at p.29, and the final solution of Congress was BAFJA.

BAFJA, like former §§ 1471(a) and (b), grants original and exclusive jurisdiction over all title 11 cases to the district courts and original, but not exclusive, jurisdiction over all civil proceedings arising in or related to a case. 28 U.S.C.

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[13] The Director of the Administrative Office of the United States Courts adopted the Emergency Rule pending congressional response. *See* Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Judicial Conference and The Legislative Process*, 22 Harv. J. on Legis. 1, 2 (1985). The Emergency Rule was the precursor to BAFJA.

§ 1334(a) and (b). Previous § 1471(c) was declared unconstitutional in *Northern Pipeline*, and there is no mirror image of § 1471(c) in § 1334.

Section 1334(c)(2) specifically requires abstention in a proceeding based upon state law claims. Section 1334(d) is particularly applicable in this case, and gives the district court exclusive jurisdiction over the debtor's property upon the filing of a petition. These sections will be addressed more particularly below.

The jurisdiction of bankruptcy judges under BAFJA is in 28 U.S.C. § 157, entitled "Procedures;" § 157(a) authorizes district courts to refer cases and proceedings arising under title 11 or arising in or related to a case under title 11 to the bankruptcy judges in their districts. The district court below exercised its authority to transfer all bankruptcy cases and proceedings to the bankruptcy court by a local rule, *Local Rules of the United States District Court for the Eastern District of Tennessee*, Rule 25.1.

The heart of BAFJA's jurisdictional scheme is in the difference between subsections (b) and (c) of § 157, which distinguish between "core" and "non-core" proceedings. From this distinction, as the Sixth Circuit correctly reasoned, "[s]ignificant jurisdictional consequences flow." App. Z, p. 112a. In fact, the distinction is crucial to the jurisdiction of the bankruptcy judge, for if the proceeding is "core," the bankruptcy judge must, given the general reference, "hear and determine" the proceeding and "enter appropriate orders and judgments," subject only to appellate review by the Article III district court under § 158. On the other hand, the bankruptcy judge, under § 157(c)(1), may only "hear" a "non-core" proceeding and submit proposed findings of fact and conclusions of law to the district court which, after "considering" the proposals, may enter a final order. If "*all*" parties to the proceeding "consent," "the *district court . . . may refer* a proceeding related to a case under title 11 *to a bankruptcy judge* to hear and determine. . . ." § 157(c)(2) (emphasis added). It is, therefore, of paramount importance

at the *outset* of every bankruptcy "proceeding" to know, for certain, whether it is a "core proceeding" or a "non-core proceeding."

The most crucial adjudication in each "proceeding," then, with respect to the issue of subject matter jurisdiction, has been mandated [§ 157(b)(3)] by Congress to be adjudicated, *not* by an Article III judge, but by a non-Article III bankruptcy judge: ("The bankruptcy judge *shall determine*, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11.") This is jurisdiction unlike any the bankruptcy judges have ever had under the Reform Act, and there are two constitutional defects inherent in this aspect of the scheme.

There is an Article III issue created by Congress assigning jurisdiction to a non-Article III judge to make the adjudication of whether the proceeding is "core" or "non-core," which determines the constitutionally permissible reach of his/her own jurisidiction in every case. A more classic exercise of judicial power is difficult to imagine.

The other constitutional defect, highlighting the first, is the vagueness of § 157(b)(1). One would expect, following *Northern Pipeline*, that Congress would at least, define "core," but this is not so. Section 157(b)(1) simply states:

> (b)(1) Bankruptcy judges may hear and determine . . . *all core proceedings* arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, . . . (emphasis added).

Section 157(b)(2) lists proceedings included within "core proceedings," but the list is expressly non-exhaustive (i.e., "Core proceedings include, but are not limited to —"). The only possible source of a definition of "core" is this Court's decision in *Northern Pipeline*, requiring analysis thereof by the bankruptcy judge in every proceeding, but this Court's opinions provide little help.

This Court has discussed the "core" of Article III at length but said very little on what is within the "core" of subject matter over which a non-Article III judge may exercise jurisdiction. The plurality opinion in *Northern Pipeline* indicates that a non-Article III judge may *only* enter final orders in cases involving "public rights." *Northern Pipeline*, 458 U.S. at 70. The Court may have shifted from the plurality's approach, *Schor*, 478 U.S. 853, but, in the bankruptcy context, the concept of "public rights" is still important because the word chosen by Congress, i.e., "core," to define bankruptcy jurisdiction was used by the Court only in its "public rights" analysis. *See* 458 U.S. at 70.

The only statement in *Northern Pipeline* regarding a "core" bankruptcy matter was "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power." *Id.* While the plurality stated that "[t]he former may well be a 'public right,' " the majority in *Granfinanciera* questioned whether the "restructuring of debtor-creditor relations is in fact a public right." 492 U.S. at 56, n.11. It is not even clear what is included within a "public right." The plurality in *Northern Pipeline* indicated that it was a right which "must at a minimum arise 'between the government and others.' " 458 U.S. at 69. That understanding, however, may have expanded to include a "private right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary," *Thomas*, 473 U.S. at 593-594. *But see Granfinanciera*, 492 U.S. at 65-70, (Scalia, J., concurring).

A congressionally created right subject to a "complex regulatory scheme," may be a "public right," *see Thomas*, 473 U.S. at 593-594, and, perhaps, a closer "public rights" question is presented in the bankruptcy context concerning "creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res," *Grandfinanciera*, 492 U.S. at 56. But, respectfully, if the Court is not settled on what is a "public right," and whether a "core" bankruptcy matter is or is not a

"public right," the non-Article III bankruptcy judge cannot be required to make the Constitutional analysis necessary to resolve such questions.

Congress' cure for the ills of jurisdiction in the bankruptcy context, dependent as it is upon whether a proceeding is "core," only makes matters worse. Since "core" is not defined, the bankruptcy judge must determine the limits of his or her jurisdiction by determining the limits of his or her jurisdiction. The tautology is obvious, and, therefore BAFJA is defective, not only for its grant of too much power to the bankruptcy judge, but, also, because it is too vague and violates the due process clause of the Fifth Amendment.

Even if "core" were defined, there remains the issue of whether the bankruptcy judge may adjudicate the proceeding measured against the "protected core of Article III." When the jurisdictional provisions of BAFJA are so measured, they must be struck down.

The bankruptcy judge below concluded that the proceeding was a "core proceeding" under the following categories of § 157(b)(2):

> (A) Matters concerning the administration of the estate;
>
> * * *
>
> (G) Motions to terminate, annul, or modify the automatic stay;
>
> * * *
>
> (O) Other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

In contrast to the word "core" in § 157(b)(1), there is no ambiguity in the language of the specific *proceedings* listed in § 157(b)(2). The "catch-all" provisions of § 157(b)(2)(A) and (O) are remarkable in their breadth. *See* King, *Jurisdiction*

and Procedure Under the Bankruptcy Amendments of 1984, 38 Vand.L.Rev. 675, 688 (1985). It is difficult to conceive of any proceeding not within (A) or (O), or why any proceeding under the specific proceedings in (B) through (N) would not also be core proceedings under (A) and (O).[14] It appears that Congress has simply specified in (B) through (N) the various types of proceedings that come up in bankruptcy and, in (A) and (O), specifically assigned jurisdiction to the bankruptcy courts as pervasive as under § 1471(c), so that only the generality of bankruptcy jurisdiction, not its scope, has changed. *See* King, *id.*

The question for this Court is whether BAFJA grants more jurisdiction to bankruptcy courts than Article III permits. The most telling fact in response is that the claim in *Northern Pipeline* could even be adjudicated by the bankruptcy court as a core proceeding under (A) or (O). In fact, there is hardly a proceeding which would not fall within § 157(b)(2); yet, "core proceedings" are broader than that list. When the expansiveness of jurisdiction under § 157(b)(1) and (2) is broadened by the jurisdiction to determine whether proceedings are "core" or "non-core," plus the extra jurisdiction if the parties simply "consent" under § 157(c)(2), the violation of Article III is arguably more blatant in its specificity than under the general former provisions; yet, there is even more in this case.

Cain challenged Pioneer's asserted interest in the Property at the threshold of the bankruptcy case. If Pioneer's interest did not exist, as claimed, there would be no federal jurisdiction under 28 U.S.C. § 1334(d). Consequently, the non-Article III bankruptcy judge's adjudication determined not only whether the bankruptcy judge, but also whether the Article III district court, had jurisdiction. Therefore, if the ruling stands, upon the mere listing by the debtor of an interest in any property, whether Cain's real estate, the Taj Mahal or one of the Justices' leather chairs, federal jurisdiction

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[14] The Bankruptcy Court below determined that Cain's motion fell under (A), (G) and (O).

automatically attaches, a non-Article III judge is empowered by Congress to determine the constitutionality of his/her jurisdiction, state law *Northern Pipeline*-type disputes, as in the instant case, will continue to be finally adjudicated by non-Article III bankruptcy judges (who, *alone*, decide whether to so adjudicate), compelled by the automatic stay, and the teachings of *Northern Pipeline* are reduced to ashes.

Bankruptcy jurisdiction after BAFJA remains unsettled. The Sixth Circuit's reasoning indicates that § 157(b)(1) grants jurisdiction which Article III prohibits; but the Sixth Circuit failed to follow through. The Sixth Circuit decision reflects confusion, at best, but it is not alone. There are many unsettled points of law in BAFJA causing confusion primarily related to the vagueness of "core proceeding."[15] Courts diverge on almost every issue that can be framed under the jurisdictional provisions of BAFJA. The confusion is exemplified by the following quote from *In Re: Northwest Cinema Corp.* 49 B.R. 479, 481 (Bankrtcy D. Minn. 1985):

> Unfortunately there were so many opinions [in *Northern Pipeline*], I do not feel that I can determine from these opinions what the Supreme Court's reaction would be to the present statutory scheme.

The Court is urged to settle the issues raised herein.

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[15] Some courts speak of the § 157(b) as "defining" core proceedings. *See, Bankruptcy Desk Guide*, § 7:60, p.69 (Lawyers Coop. Pub. 1990) and cases cited therein. Others express the opposite view. *Id.* There is a split of authority on whether "core" is to be interpreted narrowly or broadly. Some courts reason that § 157(b)(2) should be tempered by this Court's decision in *Northern Pipeline*. *Id.* at 69. Other courts reason that Congress intended "core proceedings" to be broad. *Id.* at 70. The broad interpretation views BAFJA as a cure to the constitutional defects, *id.*, and the narrow interpretation views that BAFJA did not cure the constitutional defects so that it must be read narrowly to comport with the guidelines set forth in *Northern Pipeline*, *id.* Some courts hold that the "catch-all" provisions, § 157(b)(2), (A) and (O), are no broader than the specific proceedings listed in (B) through (N), *id.*, § 7:64 at 72. Some courts even reason that matters clearly within one of the specific provisions of § 157(b)(2) are "non-core" notwithstanding the congressional designation of them as "core," *id.*, § 7:66, at 74, while other courts abide strictly by the specific list in § 157(b)(2). *Id.*

B. REASONS FOR GRANTING WRIT IN CONNECTION WITH SIXTH CIRCUIT'S DECISION THAT JURISDICTION CONFERRED BY CONSENT

1. Holding That Consent Cures The Jurisdictional Defect Is In Conflict With Decisions Of This Court.

If Article III prohibits the bankruptcy judge below from adjudicating the lease dispute as a "core proceeding," then the parties cannot confer that jurisdiction. Congress provided that a bankruptcy court may "hear" "non-core" proceedings and make proposed findings and conclusions to the district court to enter the final order after "considering" the proposals. 28 U.S.C. § 157(c)(1).[16] The Sixth Circuit held that Cain consented under § 157(c)(2). Cain asserts that § 157(c)(2) violates Article III.

Stipulation by the parties does not create subject matter jurisdiction. *California* v. *LaRue*, 409 U.S. 109, 112 n.2 (1972). Article III preserves structural interests in the separation of powers between the respective branches, and the Court held as follows in *Schor*, 478 U.S. at 850:

> To the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal court subject-matter jurisdiction beyond the limitations imposed by Article III, § 2. See, *e.g.*, *United*

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[16] There is an Article III issue in this scheme even before the issue of "consent" is reached under § 157(c)(2), even if the proceeding is "non-core." The Court in *Crowell* v. *Benson*, 285 U.S. 22 (1932) "endorsed the proposition that Congress possesses broad discretion to assign fact-finding functions to an adjunct created to aid in the adjudication of congressionally created statutory rights." *Northern Pipeline*, 458 U.S. at 81 (Brennan, J.). But that reasoning falls without a congressionally created right. The voluntariness of the reference and control by an Article III court are also important factors. *See*, *Schor*, 478 U.S. at 855. In contrast, there is no voluntariness in this case. *See*, *Granfinanciera*, n.14, 492 U.S. at 59.

> *States* v. *Griffin*, 303 U.S. 226, 229, 82 L.Ed. 764, 58 S.Ct. 601 (1938). When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests *that the parties cannot be expected to protect.* (emphasis added).

Since the bankruptcy court cannot exercise jurisdiction over the lease controversy in this case as a "core proceeding," it cannot do so merely because the parties consent.[17] In fact, the separation of powers may be more seriously jeopardized by a statutory mechanism that would invite politically powerful entities to engage in such forum-shopping. Fortunately, Article III *guarantees* the independence of those who exercise judicial power, which guarantee must be jealously guarded against such potentialities. For Article III to have any value at all, its guarantees cannot be swept aside by the wishes of adverse parties in a bankruptcy proceeding.

2. Holding That Consent Under 28 U.S.C. § 157(c)(2) May Be Implied Conflicts With Decisions Of The Eleventh And Seventh Circuits.

The Sixth Circuit held that Cain impliedly consented under § 157(c)(2),[18] which directly conflicts with the Eleventh Cir-

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[17] It appears that Congress devised the consent mechanism in reliance upon Chief Justice Burger's interpretation of the Court's holding in *Northern Pipeline*, 458 U.S. at 92. (Burger, C.J., dissenting). It does not necessarily follow from the dissent, or from the concurring opinion, at 458 U.S. at 91, that consent will always cure the jurisdictional defect as § 157(c)(2) provides. Consent was not an issue in *Northern Pipeline* so it is difficult to know exactly what was meant by the statements of Chief Justice Burger or Justice Rehnquist. But, whatever the Court did mean, it could not have meant that consent creates jurisdiction. *See, Schor*, 478 U.S. at 851.

[18] The sole basis for "express" consent in this case having been removed by the Sixth Circuit, *see* n.16, *infra*, at p.12, the only basis for consent left would be that it was implied.

cuit decisions in *In re: Brickell Investment Corp.*, 922 F.2d 696 (11th Cir. 1991) and *In re: Davis*, 899 F.2d 1136 (11th Cir. 1990) as well as the Seventh Circuit's holding in *The Home Insurance Company* v. *Cooper & Cooper, Ltd.*, 889 F.2d 746 (7th Cir. 1989).

The Seventh Circuit, in *The Home Insurance Company*, held that consent must not only be express, but must be in writing. Moreover, Section 157(c)(2) assigns the "leading role to the district judge," in deciding "whether to accept the parties' consent to referral (§ 157(c)(2))," 889 F.2d at 750, and, therefore, express consent must be made before the district court before referral of a proceeding to the bankruptcy judge. "[T]here was no reference, and consent, if any, was presented only to the bankruptcy judge." *Id.*

The consent to jurisdiction had been implied in that case under § 157(c)(2) by the failure of the parties to respond to a request by the bankruptcy judge for briefs concerning jurisdiction. The Seventh Circuit vacated the bankruptcy judge's ruling, and, reasoning that "silence is not a solid basis for an inference of consent," *id.* at 749, read Bankruptcy Rules 7008 and 7012 to require written express consent, and not before the bankruptcy judge which would cut the district judge out of the process.[19]

The Eleventh Circuit also rejected implied consent as sufficient under § 157(c)(2) in *In re: Brickell Investment Corp.* The Eleventh Circuit's decision in *In Re: Davis*, 899 F.2d 1136, moreover, highlights the Sixth Circuit's departure from the accepted and usual course of judicial proceedings.

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[19] The Sixth Circuit's reasoning also conflicts with the very case upon which it relied, *In re: Southern Industrial Banking Corp.*, 809 F.2d 329 (6th Cir. 1987), which was pointed out in Cain's petition for a rehearing. Rules 7008 and 7012(b), effective August 1, 1989, render *Southern Industrial* no longer controlling in this case. Ironically, the Second Circuit has cited *Southern Industrial* as support for its holding in *In re: Mens Sportswear*, 834 F.2d 1134 (2nd Cir. November, 1987) that consent under § 157(c)(2) could be implied, but the Second Circuit also overlooked Bankruptcy Rules 7008 and 7012(b) even though decided after the Rules became effective.

3. Manipulating The Record On Appeal To Justify A Ruling Constitutes A Serious Departure From The Accepted And Usual Course Of Proceedings.

In *In re: Davis*, the bankruptcy judge entered a final order in a proceeding which was reviewed on appeal by the district court. On appeal to the Eleventh Circuit, appellant suggested that the bankruptcy judge's order be viewed as a proposal and the district court's review as the de novo adjudication. The Eleventh Circuit rejected this "strained reasoning" as "an unplausible post hoc reconstruction of events," 899 F.2d at 1141, and, the bankruptcy judge had not even ruled that the proceeding was "core" or "non-core." The Eleventh Circuit refused to conclude that the failure of a party to challenge jurisdiction until on appeal constituted consent sufficient to give the bankruptcy court jurisdiction over a "non-core" proceeding. The consent had to be "express," and there was no consent even though the party had expressly consented to jurisdiction over a related proceeding. The Sixth Circuit has gone even farther than the Eleventh Circuit refused to go and engaged in a post hoc reconstruction of events and, even though the proceeding below was explicitly ruled to be "core," held Cain to the standard which the Sixth Circuit viewed as applicable to an imaginary ruling and ruled that Cain consented.

Not only does the decision conflict with other circuits, there simply was no consent as a matter of fact and law. Basic logic applied to 28 U.S.C. § 157(c)(1) and (2) precludes an interpretation that consent is implied by failure to object. Subsection (1) communicates to litigants what to expect when faced with a ruling that a proceeding is "non-core;" it tells them that the bankruptcy court will "hear" the facts and make proposals to the district court. It requires no response but does make available choices not otherwise available, e.g., the right to mandatory abstention under 28 U.S.C. § 1334(c) if the dispute presents state law issues. Alternatively, one may choose under subsection (2) to have the bankruptcy court "hear and determine," but, in order for subsection (1) to have

any meaning, subsection (2) must at least require some affirmative act to express the choice. To hold that one may consent under § 157(c)(2) by merely proceeding does violence even to Congress' attempt to overcome the constitutional defects cited in *Northern Pipeline* by distinguishing between "core" and "non-core" proceedings. Therefore, the Sixth Circuit should not have reached § 157(c)(2), and the most the bankruptcy court should have done, under the statutory language, even if the proceeding was ruled "non-core," would be to make proposals. In this case, however, the ruling was that the proceeding was "core" (which was not even known until the order adjudicating the proceeding was entered) and 28 U.S.C. § 157(c)(2) was not even applicable.

A motion to lift the stay in this case is inherently a challenge to bankruptcy jurisdiction. Even before *Northern Pipeline*, an action to vacate a stay was viewed as defensive in nature and not consent for a bankruptcy judge to exercise summary jurisdiction. *In the matter of Roloff*, 598 F.2d 783 (3rd Cir. 1979); *In re Axton*, 641 F.2d 1262 (9th Cir. 1981). Even the filing of a counterclaim is not consent. *Beard* v. *Braunstein*, 914 F.2d 434 (3rd Cir. 1990). To rule that a counterclaim or a motion to lift the stay is consent to a bankruptcy judge exercising power over the movant is classic "jurisdiction by ambush." *In re: J.T. Moran Financial Corp.*, 21 Bankr.Ct.Dec. (CCR) 300 (Bankr. 1991).

Faced with a bankruptcy judge's ruling that the proceeding is "core," i.e., an official representation that the court is going to enter a final order, one has no choice but to proceed or risk a default judgment. Cain, faced with the loss of its right to use of the Property to a debtor in bankruptcy by the mere listing of an interest in the Property, was forced to choose between that loss and an "unconstitutional adjudication." *See Thomas*, 473 U.S. at 582.[20] Cain thus proceeded in bankrupt-

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[20] Violations of due process and the "taking clause" under the Fifth Amendment are also implicated by the reasoning in *Thomas* especially as it

cy court only to find out, after-the-fact, that, by fighting to get its property back, it had conferred jurisdiction on a bankruptcy judge to do what it otherwise had no jurisdiction to do.

This constitutes a violation of due process in many ways,[21] but especially in that the Sixth Circuit transformed the actual record, substituting the imaginary ruling *nunc pro tunc* for the actual ruling, without giving Cain notice and opportunity to respond to such a ruling before the bankruptcy judge. Consequently, Cain's conduct was judged by a standard which does not even statutorily come into being unless the imaginary record had been the true record.[22] Cain has been the victim of a classic "jurisdiction by ambush."

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applied to Stauffer Chemical. Stauffer, which had been subjected to a lengthy arbitration under FIFRA's data compensation scheme, subsequently joined in a suit challenging the arbitration process not only under Article III, but as a taking without just compensation and a violation of due process under the Fifth Amendment. The Court held that "Stauffer has an independent right to adjudication in a constitutionally proper forum, 458 U.S. at 579, and that "appellees state an independent claim under Article III, apart from any monetary injury sustained as a result of the arbitration." *Id.* at 580. One of the issues was whether Stauffer's claim was "ripe" yet. The issue, then, under *Thomas*, is not whether Cain waited too long to raise the Article III issue, but whether it acted too soon, and arguably Cain may wait until this decision is final and file an independent claim for compensation for the unlawful adjudication under Article III, as well as the Fifth Amendment, or even in addition to raising the Article III issue by the Rule 60(b)(4) motion.

[21] See n.27, *infra*, p.35; *Thomas*, 473 U.S. at 602, n.5 (Brennan, J., concurring) and *Northern Pipeline*, 458 U.S. at 81, n.33 (Brennan, J.).

[22] Finally, the Tenth Amendment is also implicated by a federal court, especially a non-Article III bankruptcy judge, adjudicating State law issues with an outcome as significant as the one in this case. *See The Home Insurance Company*, 889 F.2d at 749 (7th Cir. 1989).

III. CONCLUSION

There is an urgent need for this Court to act in this case, not only to settle the question whether BAFJA solves the jurisdictional defects of the Reform Act and whether bankruptcy courts can continue to adjudicate state law disputes even if clearly "core" under 28 U.S.C. § 157(b)(2), and not only to resolve the conflict among the circuits on the issue whether consent under 28 U.S.C. § 157(c)(2) may be implied, but to reorder Sixth Circuit jurisprudence in this case in accordance with fundamental due process.

Respectfully submitted,

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April 3, 1992

APPENDIX A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

Case No. 3-89-01058
CHAPTER 11

IN RE:

PIONEER INVESTMENT SERVICES COMPANY,
Debtor.

PRETRIAL ORDER

This cause came before the Court on June 15, 1989 at a pre-trial conference on the motion of the Debtor, as amended, to assume an unexpired lease, the motion of The Cain Partnership, Ltd. to lift the automatic stay, the written motions to intervene of Fleet National Bank and First National Bank of Louisville, and the oral motion made in open court of First Tennessee Bank National Association to intervene, and, based on the statements of counsel as announced in open Court, and for good cause shown, it is hereby

ORDERED that:

1. The motions to intervene of Fleet National Bank, First National Bank of Louisville, and First Tennessee Bank National Association are granted.

2. The parties shall stipulate to the authenticity and admissibility of documents relevant to the legal issues hereinafter mentioned, and the parties shall file the stipulations with the Court on or before June 22, 1989.

3. Intervenors, Fleet National Bank, First National Bank of Louisville, and First Tennessee Bank National Association shall file their briefs on the legal issues hereinafter mentioned on or before June 28, 1989; and The Cain Partnership, Ltd. and Pioneer Investment Services Company shall file their supplemental briefs on the same date.

4. The legal issues to be initially heard by the Court in this case are as follows:

a. Whether the Debtor, Pioneer Investment Services Company, has any responsibility for the use of the property which The Cain Partnership, Ltd. alleges was used unlawfully.

b. Whether, in the absence of any pre-petition action taken by The Cain Partnerhsip, Ltd., the lease was terminated prior to the filing of the Chapter 11 petition.

c. Whether the leasehold interest acquired by the Debtor from Premiere Investment Properties, Inc. is capable of termination in light of the fact that there existed no express provision in the Colonial Enterprises Lease specifying the manner and/or means by which termination or forfeiture shall occur and the right of reentry and repossession.

5. The Court will hear oral argument on the legal issues stated above on July 14, 1989 at 1:30 p.m. The Debtor shall have thirty (30) minutes for oral argument, The Cain Partnership, Ltd. shall have thirty (30) minutes for oral argument, and the intervenors, Fleet National Bank, First National Bank of Louisville, and First Tennessee Bank National Association, each shall have fifteen (15) minutes for oral argument.

6. The legal issues stated above may be dispositive of these motions. If the decision of the Court on the legal issues stated above is not dispositive of these motions, the Court shall set a hearing, at a later date, on the following issues:

a. If the documents executed relative to the subject property do not absolve the Debtor of responsibility with respect to the uses of the property upon which The Mouse's Ear is located, should the documents be reformed to that effect?

b(1). Was a portion of the property for which the Debtor

is allegedly responsible assigned or sublet for an unlawful purpose?

b(2). If property demised by the Colonial Enterprises lease is used for an unlawful purpose or used to or as the place from which or by which a state or federal statute is violated, is thereby a breach of the Colonial Enterprises lease accomplished?

b(3). Does the common law, at the behest of a landlord, terminate a lease of real property if the lessee either uses the demised property for an unlawful purpose, or as the place from which or by which a public nuisance if maintained, or to violate any municipal ordinances, state or federal statute or penal law?

b(4). Can an absentee landlord, who knows or should know that real property owned by and/or leased from the landlord is being used in such a way as to be a public nuisance, be held criminally liable in Tennessee for maintaining a public nuisance?

c. Is The Cain Partnership, Ltd. estopped to assert a default for failure of the Debtor to pay certain real property taxes prior to commencement of the case?

d. Is The Cain Partnerhsip, Ltd. estopped to assert that the uses of a portion of the property for which the Debtor is allegedly responsible constitute a defult under the terms of the lease?

e(1). Is The Cain Partnership, Ltd. estopped to assert that the alleged sublease to The Mouse's Ear constitutes a default?

e(2). Is The Cain Partnership, Ltd. estopped to assert that uses made of the alleged property subleased to The Mouse's Ear constitute breaches of the lease?

f. Has The Cain Partnership, Ltd. waived pre-petition defaults by acceptance of rent payments?

g(1). Is The Cain Partnership, Ltd. estopped to assert a default with respect to payment of taxes by reason that Valley Fidelity Bank was responsible for payment of such taxes under the Escrow Agreement and was also a 40% limited partner in The Cain Partnership, Ltd.?

g(2). Is there a conflict between the interest of Valley Fidelity Bank & Trust Company ("Valley") in its role as escrow agent for Debtor and Debtor's lenders and in its role as Trustee of The Lillie Mae Cain Testamentary Trust (the fee simple owner of the real property leased and/or subleased by Debtor, which leasehold is pledged by Debtor to its lenders)?

g(3). Is The Lillie Mae Cain Testamentary Trust a legal entity separate and apart from its Trustee which is neither bound nor encumbered by acts of its Trustee which acts constitute breaches of the fiduciary duty which the Trustee owes the Trust and its beneficiaries?

g(4). Was it a breach of the fiduciary duty to the Trust for Valley, as Trustee, to serve, at the same time, as escrow agent for Debtor and its lenders and as Trustee for the Trust and its beneficiaries?

g(5). Did Debtor and its lender waive their right to hold Valley liable for damages otherwise collectible from Valley because Valley served as the escrow agent to Debtor and its lenders while burdened with a conflict with the interests of Debtor and its lenders?

g(6). Is Valley liable to Debtor's lenders and/or the bankruptcy estate of Debtor either in tort or for breach of contract for damages arising out of the failure of Valley to perform its obligation to Debtor and its lenders to pay the taxes "promptly when due"?

h. Is the Debtor a thrid-party beneficiary of the Estoppel Agreement in favor of Fleet National Bank?

i. Are the alleged unlawful purposes or acts on a portion of the property alleged to be the responsibility of the Debtor "incurable"?

j. Is the failure to timely pay taxes "incurable"?

k. In the absence of any requirement in the lease agreement requiring same, does applicable non-bankruptcy law require a lessor to provide notice, demand and/or a reasonable opportunity to cure defaults under a lease?

l. Is there any privity of contract between The Cain Partnership, Ltd. and Debtor?

m. Is Debtor merely a sublessee?

n. Is Premiere Investment Properties, Inc. the landlord of Debtor?

o. Is Premiere Investment Properties, Inc. merely, but still, a sublessee?

p. Is Colonial Enterprises, Inc. the landlord of Premiere Investment Properties, Inc.?

q. Is the tenant of The Cain Partnership, Ltd. a tenant-at-sufferance?

r. Is the tenant of The Cain Partnership, Ltd. a periodic tenant?

s. Have there occurred, post-petition, unlawful uses and uses in violation of statutes of the demised premises which cannot be cured by Debtor and which make the lease unassumable by Debtor?

The issues presented in paragraph 6 are a compilation of all of the issues submitted by the parties hereto. By the inclusion of the issues in this pretrial order, no party is precluded from arguing that any of the issues submitted by any other party are not properly before the court. Any party may suggest to the court, through appropriate pleading, that any of the foregoing issues are not to be determined within the context of a decision on the motion for stay relief and/or the motion for assumption of the unexpired lease. The listed issues in paragraph 6 may be modified subsequent to the disposition of the issues listed in paragraph 6 may be modified subsequent to the dispositon of the issues listed in paragraph 4.

7. The Cain Partnership, Ltd. and all other parties agree that the automatic stay of 11 U.S.C. § 362 shall remain in effect until further order of this Court pending a final decision of the Court on the motion of The Cain Partnership, Ltd. to lift the stay.

ENTER: this the ____ of June 1989.

ENTER: June 27, 1989.

/s/ RICHARD STAIR, JR.
United States Bankruptcy Judge

APPROVED FOR ENTRY:
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APPENDIX B

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 3-89-01058

PIONEER INVESTMENT SERVICES COMPANY a/k/a PREMIERE RESTAURANT INVESTMENT COMPANY

Debtor

MEMORANDUM ON THE CAIN PARTNERSHIP'S MOTION TO LIFT AUTOMATIC STAY AND ON DEBTOR'S MOTION FOR APPROVAL OF ASSUMPTION OF EXECUTORY CONTRACT

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

This matter is before the court on two motions: (1) a motion filed May 25, 1989, by The Cain Partnership, Ltd. (Partnership), seeking termination of the automatic stay (Automatic Stay Motion) to permit it to repossess and reenter certain real property in Knox County, Tennessee, held by the debtor under the terms of a lease (the Colonial Lease);[1] (2) a "Motion For Approval Of Assumption Of Executory Contract" (Motion To Assume) filed May 18, 1989, by the debtor.[2] By its Motion To Assume the debtor seeks an order pursuant to 11 U.S.C.A. § 365(a) (West Supp. 1989) authorizing it to assume the Colonial Lease.

The court has authorized Fleet National Bank (Fleet), First National Bank of Louisville, and First Tennessee Bank National Association (Intervenors), each of whom holds a mortgage encumbering the leasehold estate, to intervene in this contested proceeding.

All facts and documents essential to a resolution of the motions filed by the Partnership and debtor have been stipulated under the terms of written stipulations filed June 22 and July 24, 1989.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A), (G) and (O) (West Supp. 1989).

I

The Partnership contends that the Colonial Lease was automatically terminated prior to the April 12, 1989 filing of

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[1] The debtor and Partnership, pursuant to a pretrail order entered June 27, 1989, agree that the automatic stay will remain in effect pending resolution of the Automatic Stay Motion.

[2] The debtor's Motion To Assume was supplemented by an "Amended Motion For Approval Of Assumption Of Executory Contract" filed June 9, 1989.

the debtor's Chapter 11 petition. This assertion is grounded upon the failure of the debtor to pay real property taxes assessed against the leasehold property.[3] Additionally, the Partnership alleges termination of the Colonial Lease due to the use, prepetition and postpetition, of a portion of the leasehold property for an unlawful activity.

The Partnership, debtor, and Intervenors raise a substantial number of issues. However, as set forth in a Pretrial Order entered June 27, 1989, the questions for the court to determine at present are threefold: (1) whether the debtor has any responsibility for the use of 5.71 acre tract which the Partnership contends was, and presently is, being used unlawfully;[4] (2) whether, in the absence of any prepetition action taken by the Partnership, the debtor's leasehold estate was terminable prior to the filing of its Chapter 11 petition; and (3) whether the leasehold estate held by the debtor is capable of termination by the Partnership. Should the court resolve these three issues in favor of the debtor, all other issues identified in the Pretrial Order will be rendered moot.

II

An analysis of a number of stipulated documents, all of which are duly recorded, is essential to a complete understanding and resolution of the three legal issues under consideration. The relevant documents, and the facts they establish, follow.

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[3] These taxes were paid by the Partnership. The parties stipulate the debtor's present ability to reimburse the Partnership the amount of taxes plus interest. The parties further stipulate that upon a finding by the court that the lease was not terminated prior to the filing of the debtor's Chapter 11 petition, the Partnership will not assert the debtor's failure to pay these taxes in opposition to its Motion To Assume.

[4] The court has couched this issue in terms set forth in the Pretrial Order. More succinctly, the issue is whether the 5.71 acre tract constitutes a part of the debtor's leasehold estate.

DOCUMENT NO. 1

The Colonial Lease dated April 11, 1974

On April 11, 1974, the Partnership leased to Colonial Enterprises, Inc. (Colonial) 95.5 acres of land located at a site near the intersection of Kingston Pike and Cedar Bluff Road in Knox County, Tennessee.[5] Under the Colonial Lease, Colonial agreed to pay an annual rent of $18,000 as well as all real property taxes assessed against the 95.5 acres. Further, Colonial was given an option to extend the lease for an additional twenty years beyond its original twenty-year termination date.

Numbered paragraph 1. on page 3 of the April 11, 1974 Colonial Lease provides:

> This lease may be assigned or the leased premises may be sublet in whole or in part for any lawful purpose at the will of the lessee. . . .

The Colonial Lease does not contain any default or forfeiture clauses in the event of a breach by Colonial or its successors.

DOCUMENT NO. 2

"Amendment To Lease" dated April 1, 1977

The Colonial Lease was amended April 1, 1977, by an "Amendment To Lease" which provided Colonial with additional options to extend the April 11, 1974 lease fifty-five years beyond the original option expiration period. Under this amendment, Colonial also returned 1.65 acres of the original 95.5 acre tract to the Partnership, thus reducing its leasehold estate to 93.85 acres. The April 1, 1977 "Amendment To Lease" does not contain any default or forfeiture provisions.

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[5] Other stipulated documents evidence the date of the execution of the Colonial Lease as April 4, 1974, and refer to the April 11, 1974 document as a Memorandum of Lease. These disparities are immaterial.

DOCUMENT NO. 3

"Agreement" dated August 7, 1978

On August 7, 1978, Colonial sublet "four (4) to five (5) acres" of the 93.85 acre leasehold estate acquired from the Partnership to a corporation by the name of Omie, Inc. (Omie). This sublease contains no description of the sublet acreage beyond that quoted above.

DOCUMENT NO. 6

"Lease Modification and Clarification Agreement" dated January 26, 1984

The August 7, 1978 sublease "Agreement" between Colonial and Omie (Document No. 3) was subsequently amended by a "Lease Modification and Clarification Agreement" executed January 26, 1984. This document describes by metes and bounds a 5.71 acre tract which is identified as the subject of the August 7, 1978 "Agreement."

DOCUMENT NO. 4

"Sublease" dated September 1, 1979

On September 1, 1979, O & S Development Co., as "Sublessor," executed a "Sublease" in favor of John Browning, "Sublessee."[6] This "Sublease" contains no description of the subleased property by metes and bounds, street address, or otherwise. Consequently, its ability to convey any interest in property held by Omie or its successor, O & S Development Co., is questionable.[7]

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[6] The index filed with the stipulated documents parenthetically refers to O & S Development Co. as "successor to Omie, Inc." The court will rely on that stipulation notwithstanding that the record before it does not establish O & S Development as the successor to Omie.

[7] The parties do not dispute that this "Sublease" served to sublet a portion of the 5.71 acre tract leased by Omie from Colonial. The Partnership avers it is on this tract that a place of business operating under the name of the "Mouse's Ear" is engaging in unlawful activity.

DOCUMENT NO. 5

"Lease Agreement" dated October 21, 1983

A "Lease Agreement" was executed by Omie, as "Sublessor," on October 21, 1983, in favor of John Roberts and Michael Thomas, "Sublessee" [sic], whereby Omie sublet .81 acres of the 5.71 acre tract leased by it from Colonial.

DOCUMENT NO. 8

"Assignment Of Lease" dated February 1, 1984

On February 1, 1984, Colonial, as "Assignor," executed an "Assignment Of Lease." By this document, Colonial "assigned" its interest in the 5.71 acre tract sublet to Omie on August 7, 1978 (Documents No. 3 and 6) to a corporation by the name of Orange Tee, Inc. (Orange Tee), "Assignee." The "Assignment Of Lease" provides in material part:

> [T]he [5.71 acres] . . . is hereby assigned from Colonial . . . to . . . Orange Tea, Inc. who shall hereinafter stand in the stead and place of [Colonial] and be entitled to all the rights and which shall assume all obligations attendant to the August 7, 1978 [sublease "Agreement" between Colonial and Omie (Documents No. 3 and 6)]. . . .

DOCUMENT NO. 10

"Assignment Of Lease" dated July 17, 1984

On July 17, 1984, Colonial entered into an "Assignment Of Lease" with Premiere Investment Properties, Inc. (Premiere), under which it transferred and assigned its interest in the April 11, 1974 Colonial Lease (Document No. 1) to Premiere. More specifically, this "Assignment Of Lease" provides in material part:

> Colonial [Assignor] . . . hereby transfers, assigns and sets over unto Premiere [Assignee] . . . all of the right, title and interest of the Assignor in and to that certain Lease, dated April 11, 1974, from The Cain Partner-

> ship, Ltd. to Colonial . . . as evidenced by a certain Memorandum of Lease Agreement, dated April 11, 1974. . . . The real property affected by such Lease, as amended, is described in Exhibit A attached hereto and incorporated herein by reference.

Exhibit A to the July 17, 1984 "Assignment Of Lease" contains metes and bounds descriptions of two tracts: Tract 1 is an 86.54 acre tract; Tract 2 is a tract containing an unspecified acreage. The parties do not dispute the intent or effect of this instrument — that Colonial's interest in the leasehold property acquired from the Partnership on April 11, 1974 (Document No. 1), was transferred and assigned to Premiere.

DOCUMENT NO. 14

"Assignment Of Lease" dated April 13, 1987

On April 13, 1987, Premiere transferred its interest in the Colonial Lease acquired July 17, 1984, (Document No. 10), to the debtor by way of an "Assignment Of Lease." This document provides in material part:

> Premiere [Assignor] . . . hereby transfers, assigns and sets over unto Pioneer [Assignee] . . . all of the right, title and interest of the Assignor in and to that certain Lease, dated April 11, 1974, from The Cain Partnership, Ltd., to Colonial . . . as evidenced by a certain Memorandum of Lease Agreement, dated April 11, 1974 . . . as amended by Amendment to Lease, dated April 1, 1977. . . . Such Lease, as amended, was assigned from Colonial . . . to Assignor by Assignment of Lease, dated as of July 17, 1984. . . . The real property affected by this Lease, as amended, is described in Exhibit A attached hereto and incorporated herein by reference.

Exhibit A, describing the real property affected by the "Assignment Of Lease," contains a description of a single

tract: the 86.54 acre tract described in the July 17, 1984 "Assignment Of Lease" from Colonial to Premiere (Document No. 10).

DOCUMENT NO. 17

"Lease Assumption And Attornment Agreement" dated April 16, 1987

On April 16, 1987, the debtor and Partnership entered into a "Lease Assumption And Attornment Agreement" under which the Partnership recognized the debtor as the tenant under the Colonial Lease.

DOCUMENT NO. 20

"A Non-Disturbance And Attornment Agreement" dated June 16, 1987

On June 16, 1987, the Partnership, Omie, Orange Tee, and others, executed a document designated "A Non-Disturbance And Attornment Agreement." This document, at paragraph (iv) of a section entitled "*RECITALS*," contains a statement that "Orange Tee has succeeded to the interest of Colonial . . . pursuant to Assignment dated February 1, 1984. . . ." (Document No. 8). Paragraph (i) of this document in a section entitled "*AGREEMENT*" further provides:

> (i) [The Partnership] and Orange Tee do not object and hereby consent to all of the Leases as set forth herein . . . and specifically those leases by which Omie . . . shall occupy tracts 1 and 2 of the premises described on Exhibit "A" and further agree that in the event of a termination, cancelation or modification or any other change with respect to any of the Parent Leases [i.e., the lease from Owner to [the] Partnership . . . or the Lease from [the] Partnership to Colonial . . . (*assigned to Orange Tee by Assignment* . . .)] the rights of Brown and Omie and its successors and assigns to possession and use of the premises in accordance with the subleases from Colonial . . . to Omie . . .

> shall not be affected so long as Brown and Omie or their successors or assigns are performing their obligations as stated in said Subleases[.] (emphasis added.).

Exhibit A to the June 16, 1987 "A Non-Disturbance And Attornment Agreement" specifically includes the 5.71 acres sublet by Colonial to Omie under the terms of the August 7, 1978 sublease, as modified January 26, 1984 (Documents No. 3 and 6).

III

ISSUE NO. 1

DEBTOR'S RESPONSIBILITY FOR USE OF PROPERTY WHICH THE PARTNERSHIP CONTENDS WAS AND IS BEING USED UNLAWFULLY

Under the broad heading of the first issue, the court must consider whether the 5.71 acres "assigned" to Orange Tee by Colonial under the February 1, 1974 "Assignment Of Lease" (Document No. 8) divested Colonial of all further interest in this tract. If so. Colonial could not have assigned its interest in this acreage to Premiere (Document No. 10), and Premiere, in turn, could not have assigned any interest in the acreage to the debtor (Document No. 14). The debtor cannot be held accountable for an unlawful use of property which is not part of its leasehold estate.[8]

The debtor contends that under the terms of the Colonial Lease (Document No. 1), Colonial had the power to assign its leasehold estate in whole or in part. The debtor also contends that once Colonial assigned its interest in the 5.71 acres to

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[8] It is undisputed that the activity alleged by the Partnership to be unlawful is occurring in connection with the operation of the business known as the "Mouse's Ear." It is also undisputed that this business is situated on a portion of the 5.71 acre tract subleased to Omie by Colonial (Documents No. 3 and 6). This same 5.71 acre tract is the subject of the "Assignment Of Lease" executed February 1, 1984, by Colonial in favor of Orange Tee. (Document No. 8).

Orange Tee, it was without further power to assign the 5.71 acres to Premiere. The debtor further argues that not only is the Partnership aware that the 5.71 acre tract is not part of the debtor's leasehold estate, it has acquiesced in and ratified a series of leases, subleases, and assignments which establish that the 5.71 acres was excluded from the estate leased to Premiere and the debtor. Finally, the debtor contends that the Partnership has waived its right to argue that the assignment to Orange Tee was invalid.

The Partnership asserts that the assignments from Colonial to Premiere (Document No. 10) and from Premiere to the debtor (Document No. 14) included Colonial's interest in the 5.71 acres. The Partnership argues that the Colonial Lease allowed Colonial to sublet the 95.5 acres "in whole or in part" but permitted it to assign only the entire leasehold. See discussion of Document No. 1, p. 6. The Partnership argues that the purported assignment by Colonial to Orange Tee was in reality a sublease. It further contends that it never consented to any assignment of the 5.71 acres by Colonial to Orange Tee. The court disagrees.

Initially, it must be determined whether the February 1, 1984 "Assignment Of Lease" from Colonial to Orange Tee (Document No. 8) constituted an assignment of Colonial's leasehold interest in the 5.71 acres. The Tennessee Supreme Court has stated:

> [T]he general distinction between an assignment of a lease and a sublease is that the former conveys the whole term, leaving no interest or reversionary interest in the assignor, while the latter grants the subtenant an interest in the leased premises less than the lessee's, or reserves to the lessee a reversionary interest in the term.

First American National Bank v. *Chicken System of America, Inc.*, 510 S.W.2d 906, 908 (Tenn. 1974). *See also Murphy* v. *Reynolds*, 212 S.W.2d 686 (Tenn. Ct. App. 1948) (*cert. denied* 1948); 6 Am.Jur.2d, *Assignments*, § 1 (1963 & Supp. 1989); 3 Restatement of (Second) Contracts § 317 (1981).

The February 1, 1984 "Assignment Of Lease" (Document No. 8) exectued by Colonial in favor of Orange Tee states:

> [T]he [5.71 acres] is hereby assigned . . . to Orange Tee, Inc., who shall hereinafter stand in the stead and place of Assignor *and* be entitled to all the rights and which shall assume all obligations attendant to the August 7, 1978 agreement. (emphasis added).

The February 1, 1984 "Assignment Of Lease" labels the transaction an "assignment." The quoted passage indicates that Orange Tee was assigned Colonial's interest in the 5.71 acres "and" that Orange Tee would assume Colonial's position relative to Colonial's sublessee, Omie (Documents No. 3 and 6). Viewing the entire document, it is patently clear that Colonial, through the "Assignment Of Lease," intended to assign its entire interest in the 5.71 acre leasehold estate to Orange Tee. The court concludes that the February 1, 1984 "Assignment Of Lease" (Document No. 8) divested Colonial of any further interest in the 5.71 acres.

The language in the Colonial Lease (Document No. 1) — "This lease may be assigned or the leased premises may be sublet in whole or in part . . ." — did not restrict the power of Colonial to assign a part of its leasehold estate, i.e., the 5.71 acres, to Orange Tee. Tennessee courts have set forth principles to guide this court in its analysis and interpretation of the disputed phrase.

"It is the Court's duty to enforce contracts according to their plain terms." *Bob Pearsall Morots, Inc.* v. *Regal Chrysler-Plymouth, Inc.*, 521 S.W.2d 578, 580 (Tenn. 1975). *Accord Cocke County Bd. of Highway Commissioners* v. *Newport Utilities Bd.*, 690 S.W.2d 231, 237 (Tenn. 1985).

The Partnership suggests that an examination of the phrase — "This lease may be assigned or the leased premises may be sublet in whole or in part . . ." — leads to the conclusion that an assignment of less than the entire lease is prohibited.

The quoted phrase is arguably susceptible of three possible interpretations: (1) that the language "in whole or in part" has application to both an assignment and subletting of the

leasehold estate; (2) that, as is suggested by the Partnership, "in whole or in part" applies only to subletting; and (3) that notwithstanding that the disputed phrase may refer exclusively to subletting, there is still no limitation on Colonial's power to assign the lease "in whole or in part." The ambiguity in this phrase indicates that a plain meaning analysis is not possible.

One court has stated that "[t]he cardinal rule for interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention, consistent with legal principles." *Bob Pearsall Motors, Inc.* v. *Regal Chrysler-Plymouth, Inc.* 521 S.W.2d 578, 580 (Tenn. 1975). *See also Ballard* v. *North American Life and Casualty Co.*, 667 S.W.2d 79 (Tenn. Ct. App. 1983).

Under the rule of "practical construction," ambiguous provisions should be interpreted in accordance with the interpretation apparently placed upon them by the parties as shown by their conduct. *Hamblen County* v. *City of Morristown*, 656 S.W.2d 331, 335 (Tenn. 1983); *Duncan* v. *Peebles*, 192 S.W.2d 235 (Tenn. Ct. App. 1946); *Frierson* v. *International Agricultural Corp.*, 148 S.W.2d 27 (Tenn. Ct. App. 1940) (*cert. denied* 1941).

In the instant proceeding, the intention of the Partnership and Colonial, as evidenced by their conduct, is the appropriate basis upon which the disputed phrase should be interpreted.[9] That intention is readily ascertainable.

The Partnership expressly acknowledged and consented to the assignment of the 5.71 acre tract to Orange Tee in the June 16, 1987 "A Non-Disturbance And Attornment Agreement" (Document No. 20), discussed *supra*. Not until after the debtor filed its bankruptcy petition did the Partnership question the legal significance of Colonial's assignment to

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[9] The record does not establish whether the Partnership or Colonial drafted the April 11, 1974 Colonial Lease. Therefore, the rule of construction which provides that where language of a contract lacks clarity, the contract will be construed most strongly against the party who drew it, cannot be applied. *Hanover Ins. Co.* v. *Hanley*, 425 S.W.2d 590 (Tenn. 1968); *Coble Systems, Inc.* v. *Gifford Co.*, 627 S.W.2d 359 (Tenn. Ct. App. 1981).

Orange Tee. The conduct of the Partnership confirms the intention of the parties under the April 11, 1974 Colonial Lease (Document No. 1) — Colonial had the right to assign its leasehold estate "in whole or in part."

In addition, the Partnership has ratified the assignment to Orange Tee. In an unrelated case involving the Partnership, *Valley Fidelity Bank and Trust Company* v. *The Cain Partnership, Ltd.*, 738 S.W.2d 638 (Tenn. Ct. App. 1987), the successor trustee brought an action against the Partnership and the three Cain sisters seeking declaratory relief regarding the amount of rental money and the successor trustee was required to collect from the Partnership. Speaking to ratification, the court stated:

> A voidable contract is subject to ratification. . . . [R]atification can be described as "confirmation after conduct" manifested by acts or statements. Silence can amount to a ratification where a party with knowledge of the transaction fails for a reasonable time to protest or dissent. However, there can be no ratification unless a party is informed of the facts necessary to form an opinion.

738 S.W.2d at 639-640 (citation omitted). *See Trotter* v. *Peterson*, 60 S.W.2d 149 (Sup. Ct. Tenn. 1933).

The Partnership expressly ratified the February 1, 1984 Colonial "Assignment Of Lease" to Orange Tee (Document No. 8). By its execution of the June 16, 1987 "A Non-Disturbance and Attornment Agreement" (Document No. 20), the Partnership specifically acknowledged that "Orange Tee has succeeded to the interest of Colonial . . . [in the 5.71 acres] pursuant to Assignment dated February 1, 1984. . . ." (Document No. 20, *RECITALS*, par. (iv)). The Partnership cannot now complain that it did not know of the assignment until recent months. By its acts the Partnership has expressly ratified Colonial's assignment of te 5.71 acres to Orange Tee.[10]

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[10] Arguably, the Partnership has waived its right to now object to the

Once the 5.71 acres had been assigned to Orange Tee, Colonial lacked the power to transfer that acreage to Premiere. *Union & Planters Bank & Trust Company* v. *Linden St. Christian Church*, 3 Tenn. App. 540 (Tenn. Ct. App. 1926) (*cert. denied* 1926): *see also Kivett* v. *Mayes*, 354 S.W.2d 492 (Tenn. Ct. App. 1961) (*cert. denied* 1961). The February 1, 1984 "Assignment Of Lease" (Document No. 8) executed by Colonial in favor of Orange Tee, effectively removed the 5.71 acres from the Colonial leasehold estate. The debtor is, therefore, not accountable for the conduct of any alleged unlawful activity on the property.

Issue No. 1 is resolved in favor of the debtor.

IV

ISSUE NO. 2

TERMINABLE NATURE OF DEBTOR'S LEASE PRIOR TO BANKRUPTCY

The second issue before the court is whether in the absence of some affirmative action by the Partnership to terminate the Colonial Lease, the lease was terminable prior to the filing of the debtor's Chapter 11 petition. It is undisputed that the Partnership took no action to terminate the lease.

The Partnership contends that notwithstanding the absence of action on its part to terminate the Colonial Lease prior to the filing of the debtor's bankruptcy petition, the Colonial Lease was nonetheless terminated at the time the debtor filed its petition.[11] The debtor submits that the failure of the Part-

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assignment to Orange Tee. *See Woods* v. *Forest Hill Cemetery*, 192 S.W.2d 987 (Tenn. 1946); *Planters Ins. Co.* v. *Diggs*, 67 Tenn. (8 Baxter) 563 (Tenn. 1876); 20 Am. Jur.2d *Covenants, Conditions, and Restrictions*, § 18 (1965). In view of the determinations reached *supra*, the court need not reach this question.

[11] Alternatively, the Partnership argues that in the event the court determines a termination clause is not essential to its ability to terminate the lease, but that notice and demand were required and such demand was not given, then all the debtor had on the date it filed its petition was a periodic tenancy for one year. The court need not address this argument.

nership to take affirmative action to terminate the Colonial Lease prior to bankruptcy defeats the Partnership's argument that the lease was terminated prepetition.

Affirmative conduct is required by a lessor to terminate a nonresidential lease which lacks a forfeiture clause. The Tennessee Court of Appeals recently stated:

> Tennessee follows to a point an ancient common law rule that to be an effective forfeiture, the landlord must demand the rent on the day it is due before sunset, and at the most public place on the land. *Parks* v. *Hays*, 92 Tenn. 161, 162, 22 S.W. 3,4 ([Tenn.] 1893). However, the necessity of demand as a condition precedent to the forefeiture of a lease may be waived by agreement.
>
> . . .
>
> In the instant case, the language in the lease is clear and unmistakable. Upon the breach of any of the conditions stated in the lease, the plaintiff reserved the right to declare the lease forfeited within ten days after notice of default. . . . [the lessee] was given the proper notice . . . A "ten day to cure" clause is reasonable. *It prevents an automatic forfeiture which is not favored by the court because of its harshness.*

Nashville Record Productions, Inc. v. *Mr. Transmission, Inc.*, 623 S.W.2d 281, 283 (Tenn. Ct. App. 1981) (emphasis added).

In *Arnold* v. *Lemond*, 241 S.W.2d 430 (Tenn. 1951), a case concerning the lease of a nonresidential building, the court stated:

> The common law rule is that to effect a forfeiture of the lease for nonpayment of rent, the landlord must make demand before the close of the day that the rent becomes due.

Id. at 432.

In *Planters Insurance Co.* v. *Diggs*, 67 Tenn. (8 Baxter) 563

(Tenn. 1876), the disputed lease contained a forfeiture clause providing for termination of the lease upon the failure of the leasee to pay the real property taxes. The court stated:

> It has long been settled as part of the common law that forfeitures for conditions of the kind found in this lease are not favored by the courts. . . .
>
> . . .
>
> [F]orfeiture is to be enforced at the option of the lessor, and by an affirmative act on his part, that is by re-entry for such purpose, based on failure to perform or breach of the conditions, and do not take effect until this is done. In courts of equity the rule is settled, that such forfeitures are relieved against whenever compensation can be made, the clause for re-entry being treated as a mere security for the payment of the rent.
>
> . . .
>
> This case is to perform a collateral condition, however, that is, to pay the taxes, but the principle is substantially the same. . . . [I]f the payment be made before the forfeiture is taken advantage of by re-entry by the landlord for this purpose, in accordance with the provision contained in the lease, the forfeiture is saved. The forfeiture is only enforceable by such affirmative action. . . .

Id. at 567-69.

Thus, automatic forfeiture of a nonresidential lease is not favored in Tennessee. *Planters, supra; Nashville Record Productions, Inc.* v. *Mr. Transmission, Inc.*, 623 S.W.2d 281, 283 (Tenn. Ct. App. 1981); *see generally, Allen* v. *Dent*, 72 Tenn. 676 (Tenn. 1880).

The law in Tennessee clearly requires that the lessor make demand upon the lessee unless the parties agree otherwise. The Colonial Lease lacks any clause denoting such an agreement.[12]

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[12] It is of academic interest that the Partnership, on April 16, 1987,

In the absence of affirmative action by the Partnership prior to the commencement of this case, April 11, 1974 Colonial Lease was not terminable.

Issue No. 2 is resolved in favor of the debtor.

V

ISSUE NO. 3

WHETHER THE DEBTOR'S LEASEHOLD INTEREST IS CAPABLE OF TERMINATION IN THE ABSENCE OF AN EXPRESS PROVISION IN THE COLONIAL LEASE SPECIFYING THE MANNER AND/OR MEANS BY WHICH TERMINATION OR FORFEITURE SHALL OCCUR

The third issue confronting the court is whether in the absence of a forfeiture clause the Colonial Lease automatically terminated prior to bankruptcy because of the debtor's failure to pay property taxes assessed against the leasehold estate. The Partnership asserts that the very absence of an explicit provision in the Colonial Lease specifying prerequisites to termination makes the Lease "terminable concomitant with a breach."[13] Partnership's *Revised Memorandum* at p. 2. The debtor argues that the lack of a termination clause in the event of default or forfeiture means that there is no basis on which the lease could terminate prior to its stated expiration date.

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through an unrecorded "Estoppel Certificate and Agreement" executed by it and Fleet, burdened itself with providing Fleet notice and an opportunity to cure any default by the debtor under the April 11, 1974 Colonial Lease. (Document No. 18, p. 2-3, par. 8(e) and (f)). The debtor was not a party to this document.

[13] The Partnership argues that "the refusal of the Partnership to lease the property to Colonial burdened with special conditions in order to effectuate a termination, is an explicit benefit bargained for by the Partnership." *Revised Memorandum* at p. 2. No evidence has been offered demonstrating that the Partnership bargained to exclude a termination clause from the Colonial "Lease." It is difficult to give credence to this assertion.

The Partnership interprets a recent unreported Tennessee court of appeals case to stand for the proposition that in the absence of a termination clause in a nonresidential lease, termination upon an act of default occurs automatically. *Pizza Pumps of America, Inc.* v. *Krispy Kreme Doughnut Corp.*, 11 TAM 52-13 (Tenn. Ct. App. 1986) (available on WESTLAW at 1986 WL 12174).[14] *Pizza Pumps* cannot be read to stand for this proposition.

In *Pizza Pumps*, the disputed lease contained in default clause which specified notice and an opportunity to cure should the lessee default. The lease provided that failure of the sublessee to pay rent when due was a default; that the sublessee would have thirty (30) days from the date of notice of default to cure the default; but that there would be no thirty (30) day period to cure a default in the payment of rent.

To the Tennessee Court of Appeals, the issue concerned whether notice of default and an opportunity to cure were required in the face of the late paid rental payments. The court concluded that despite the language in the lease requiring notice and an opportunity to cure upon default, the provision concerning late rental payments meant that upon the lessee's failure to pay the rent when due, the lessor could regard the lease as forfeited. The court found that the lease had terminated as per its terms.

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[14] This court is reluctant to accord *Pizza Pumps*, an unpublished opinion, any precedential value. In construing the weight of an unpublished Tennessee state court opinion, the Tennessee Supreme Court has noted its unwillingness to rely on such opinions. *Fisher* v. *State of Tennessee*, 277 S.W.2d 340 (Tenn. 1955). The court further stated that where there is no authority for a matter except in an unpublished opinion, "the opinion is not to be taken as general authority," *Id.* at 341; *Southern Railway Co.* v. *Foote*, 384 F.2d 224 (6th Cir. 1967) (As unpublished Tennessee state court opinions are not binding upon Tennessee state courts, neither are they binding on federal courts.); *Waldschmidt* v. *Smith (In re York)*, 43 B.R. 36 (Bankr. M.D. Tenn. 1984).

In this matter, the court is not bound by the holding in *Pizza Pumps*. In view of the importance the Partnership places upon the case, this court will, however, comment on this unpublished opinion.

The Partnership misinterprets *Pizza Pumps* to stand for the proposition that upon a lessee's default notice and demand are not required absent a provision in the lease requiring notice and demand. The Partnership ignores the facts. In *Pizza Pumps*, the parties contracted for specific courses of action should the sublessee commit various acts of default. Specifically, if the act was a failure to timely pay the rental payments, the parties agreed that the lease would terminate automatically without notice and an opportunity to cure. No such agreement exists in the Colonial Lease. *Pizza Pumps* is inapposite.

The Partnership also relies on *Murphy* v. *Reynolds*, 212 S.W.2d 686 (Tenn. Ct. App. 1948) (*cert. denied* 1948). In *Murphy*, the disputed lease enumerated various acts of default including a prohibition against an assignment of the leasehold property. The lease also provided that the lessor, should an act of default occur, had the option to cancel the lease by giving thirty (30) days notice to the lessee.[15] The Tennessee Court of Appeals determined that the lessee had assigned the lease in violation of the lease agreement. Therefore, it upheld the lower court's finding that the lease had been terminated.

Murphy, the Partnership argues, demonstrates that there is no rule in Tennessee requiring notice, demand, or an opportunity to cure. Contrary to the Partnership's interpretation, *Murphy* stands for the simple proposition that where a lessee commits a specified act of default, Tennessee courts will enforce the contractual agreement of the parties relative to the effect of that default. *Murphy* does not support the Partnership's assertion that the Colonial Lease can automatically terminate in the absence of a termination clause.

Another case relied upon by the Partnership is *In re Memphis-Friday's Associates*, 88 B.R. 830 (Bankr. W.D. Tenn. 1988). The court in *Memphis-Friday's* had before it an involuntary Chapter 11 debtor's motion to assume a

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[15] However, it appears that the power of the lessee to cure a default upon notice was not included in the lease.

nonresidential lease. The lease contained a default clause and a provision allowing the debtor an opportunity to cure. The court determined that the lessor had given the required notice; that the debtor had not cured the default; that the lease had terminated prior to the entry of the Order for Relief; and that the lease could not be assumed as it was not property of the estate.

The Partnership contends that had there been no termination clause in the *Memphis-Friday's* lease, termination would have occurred automatically without notice and opportunity to cure. This conclusion cannot be garnered from the *Memphis-Friday's* opinion. Judge Brown did not speak to the question of lease termination in the absence of a default clause. He had no reason to do so. The disputed lease in *Memphis-Friday's* contained a default clause.

Based upon *In re Memphis-Friday's*, *Murphy*, and the unreported Tennessee Court of Appeals decision in *Pizza Pumps*, the Partnership seeks a determination by this court that a nonresidential lease entered into in Tennessee is a bilateral contract with mutually dependent covenants, and that upon a breach of a covenant the lease automatically terminates without affirmative action by the lessor. The court declines to make such a finding.

The debtor relies upon several cases to support its assertion that in the absence of a forfeiture clause in the Colonial Lease, that lease can terminate only upon the occurrence of the stated termination date.[16]

In *Greene* v. *Donnell*, 11 Tenn. App. 366 (Tenn. Ct. App. 1930), the lessor argued that a nonresidential lease was

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[16] The Partnership aptly notes that two of the cases relied upon by the debtor, *Smith* v. *Holt*, 193 S.W.2d 100 (Tenn. Ct. App. 1945) (*cert. denied* 1946) and *Barnett* v. *Dooley*, 212 S.W.2d 598 (Tenn. 1948), are distinguishable as they concern termination of residential leases. The court in *Smith* noted that "[a] tenant's failure to pay rent does not terminate or forfeit his tenancy, in the absence of a provision in the lease for such forfeiture. . . ." 193 S.W.2d at 49 Am. Jur. 2d, *Landlord and Tenant* § 1020 (1970) (footnotes omitted); *see also Schultz* v. *Ramey*, 64 N.M. 366, 328 P.2d 937 (N.M. 1958).

forfeited because the tenant failed to pay rent. The chancellor determined that the lessor could not maintain an unlawful detainer action because the lease lacked forfeiture and reentry provisions. The Court of Appeals affirmed and stated:

> There was no clause in the lease contract whereby it was provided that the lease could be determined [sic] if Greene failed to pay his rent. A failure to pay rent does not work a forfeiture.

11 Tenn. App. at 371 (citation omitted).

Am.Jur.2d states:

> A forfeiture of the leasehold may result by virture of the common law . . . or by virtue of some clause in the lease providing for forfeiture in case of breach of covenant or condition. In the absence, however, of an express stipulation or proviso to that effect, the general rule is that the breach by the lessee of the covenants or stipulations on his part contained in the lease does not work a forfeiture of the term, and that the lessor's remedy is by way of a claim for damages.

49 Am.Jur.2d, *Landlord and Tenant* § 1020 (1970) (footnotes omitted); *see also Schultz* v. *Ramey*, 64 N.M. 366, 328 P.2d 937 (N.M. 1958)

The Partnership has failed to demonstrate that in Tennessee the absence of a termination clause calls for automatice termination of a nonresidential lease upon the lessee's breach of a covenant. The court's research does not support the Partnership's argument. This court finds that in the absence of a terination or default clause, a nonresidential lease does not terminate automatically in Tennessee when a covenant in the lease is breached.[17]

Issue No. 3 is resolved in favor of the debtor.

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[17] The Partnership has not addressed the far-reaching implications of such a harsh forfeiture rule. To accept its analysis would mean that a lease would automatically terminate upon breach of a covenant, even if the nonbreaching party did not desire termination. A lessee who inadvertently or innocently breached a covenant would, under the Partnership's theory, terminate the lease.

VI

DEBTOR'S MOTION TO ASSUME LEASE

By its motion failed May 18, 1989, and supplemented June 9, 1989, the debtor seeks to assume the Colonial Lease. Assumption of unexpired leases is governed by § 365 of the Bankruptcy Code which provides in material part:

> Executory contracts and unexpired leases
>
> (a) [T]he trustee, subject to the court's approval, may assume or reject any . . . unexpired lease of the debtor.
>
> (b)(1) If there has been a default in an . . . unexpired lease . . . the trustee may not assume such . . . lease unless, at the time of assumption of such . . . lease, the trustee —
>
> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
>
> (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such . . . lease, for any actual pecuniary loss to such party resulting from such default; and
>
> (C) provides adequate assurance of future performance under such . . . lease.

11 U.S.C.A. § 365 (West 1979 & Supp. 1989).

In its Motion To Assume, as amended, the debtor asserts that it is current in its obligations under the Colonial Lease except for the payment of a portion of the real property taxes. It also asserts that rental payments it is receiving from sublet portions of the real estate are sufficient to meet its obligations to the Partnership and to afford the Partnership adequate assurance of future performance. In an objection to the Motion To Assume filed May 26, 1989, the Partnership alleges that when the debtor filed its bankruptcy petition it

was not current with all of its lease obligations, specifically the payment of approximately $89,000.00 in real property taxes.

On July 20, 1989, the debtor and Partnership filed the following stipulations:

> [I]t is stipulated between the Partnership and Pioneer that, if the Lease is finally adjudicated by this court not to have terminated pre-petition, subject to any appellate court ruling to the contrary:
>
> 1. Based on the representation by Pioneer that it will pay or cause to be paid to the Partnership an amount equal to the real property taxes paid by the Partnership, plus interest at the legal rate, from the date the real property taxes were paid by the Partnership, the Partnership stipulates that the pre-petition failure to pay the subject taxes will not be asserted as a continuing basis of objection by the Partnership to assumption of the Lease by Pioneer.
>
> 2. Based on known facts presently of record in the instant case . . . [the debtor] is able to adequately assure future performance of its monetary obligations under the Lease.

The Partnership's initial objections have been met. Through the above stipulation, the § 365(b)(1)(A), (B), and (C) criteria which the debtor must meet as a prerequisite to its assumption of the Colonial Lease have been satisfied. The Partnership does not dispute the debtor's ability to pay the prepetition property taxes. Further, the Partnership stipulates that the debtor has provided "adequate assurance of future performance" under the Colonial Lease. The court is satisfied that the debtor has met the necessary prerequisites to the assumption of the Colonial Lease. The Motion To Assume will be granted.

CONCLUSION

For the reasons discussed herein, the Partnership's Automatic Stay Motion shall be denied. The debtor's Motion To Assume, as amended, shall be granted.

This Memorandum constitutes findings of fact and conclusions of law as required by Fed. R. Bankr. P. 7052. An appropriate order will be entered.

FILED: September 15, 1989.

BY THE COURT

/s/ RICHARD STAIR, JR.
United States Bankruptcy Judge

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

Case No. 3-89-01058

In re

PIONEER INVESTMENT SERVICES COMPANY
a/k/a PREMIERE RESTAURANT
INVESTMENT COMPANY

Debtor

ORDER

For the reasons set forth in the "Memorandum On The Cain Partnership's Motion To Lift Automatic Stay And On Debtor's Motion For Approval Of Assumption Of Executory Contract" filed this date, containing findings of fact and conclusions of law as required by Fed. R. Bankr. P. 7052, it is ORDERED as follows:

1. That the motion filed May 25, 1989, by The Cain Partnership, Ltd., seeking termination of the automatic stay to permit it to repossess and reenter the debtor's leasehold premises situated in Knox County, Tennessee, shall be and is DENIED.

2. That the debtor's "Motion For Approval Of Assumption Of Executory Contract" filed May 18, 1989, as amended June 9, 1989, shall be and is GRANTED.

3. That the debtor, upon reimbursement to The Cain Partnership, Ltd., of all unpaid prepetition real property taxes assessed against its leasehold property, plus interest at the legal rate in Tennessee, shall be and is permitted to assume that certain "Lease" between The Cain Partnership, Ltd., lessor, and Colonial Enterprises, Inc., lessee, dated

April 11, 1974, as amended by an "Amendment To Lease" dated April 1, 1977, said lease, as amended, having been assigned in part to Premiere Investment Properties, Inc., by an "Assignment Of Lease" dated July 17, 1984, said lease having been further assigned by Premiere Investment Properties, Inc., to the debtor by an "Assignment Of Lease" dated April 13, 1987, the debtor's leasehold estate containing 86.54 acres, more or less.

ENTER: September 15, 1989.

BY THE COURT

/s/ RICHARD STAIR, JR.
United States Bankruptcy Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

No. CIV 3-89-0827

In re: PIONEER INVESTMENT SERVICES COMPANY,
Debtor.

THE CAIN PARTNERSHIP, LTD.,
Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY, et al.,
Appellees.

MEMORANDUM OPINION
(Filed March 8, 1990)

This is an appeal from a decision of the United States Bankruptcy Court for the Eastern District of Tennessee. The controversy arose out of opposing motions, the debtor's motion for approval of its proposed assumption of a lease, and the debtor's lessor's motion for relief from the automatic stay for the purpose of repossessing the demised premises. Pursuant to the Bankruptcy Court's Pretrial Order, the parties stipulated the authenticity and admissibility of a compilation

of copies of 20 documents pertinent to the issues raised by the motions.

In its Pretrial Order, the Bankruptcy Court specified three issues to be addressed by the movants: whether the debtor has any responsibility for the use of certain real property which the debtor's lessor alleges is being used unlawfully, whether the lease was terminated prepetition in the absence of any prepetition action on the part of the lessor to terminate it, and whether the debtor's leasehold is subject to termination given the absence of an express provision in the lease agreement specifying the manner and/or means by which termination or forfeiture is to occur, or specifying any right of reentry or repossession. The other appellees, the debtor's lenders, were granted leave to intervene in light of their interests as secured lenders in the demised premises and in the debtor's continuance of its operation of the demised premises.

It is necessary to identify the parties, and to describe in some detail the transactions which affected prepetition the demised premises and the debtor's leasehold in these premises. The appellant, which the Court will refer to as "the Partnership," is the lessee of a tract of land described as consisting of approximately 95.5 acres, in Knox County, Tennessee. Since its lease is the head lease, the Partnership can be treated as if it were the owner of the demised premises for the purposes of this appeal.

The debtor, which the Court will refer to as "PISCO," is the Partnership's tenant as the result of a series of assignments beginning with an assignment made by the Partnership's original lessee. However, the position of PISCO is that it is the Partnership's tenant only with respect to a portion of the approximately 95.5-acre tract leased by the Partnership to its original lessee. PISCO takes this position because, before PISCO became the Partnership's tenant, the Partnership's original lessee first sublet a small tract to a sublessee named Omie, Inc., then assigned its leasehold in this small tract, as

well as its rights under its sublease agreement with Omie, Inc., to an assignee named Orange Tee, Inc. PISCO therefore takes the position that it is not the Partnership's tenant with respect to the small tract sublet to Omie, Inc.

The Partnership takes a contrary position, not surprisingly, that the transaction between its original lessee and Orange Tee, Inc. was either merely an assignment of the original lessee's rights under its sublease agreement with Omie, Inc., or a sublease itself. The importance of this issue rests on the fact that one of the Partnership's asserted grounds for relief from the automatic stay is that PISCO's leasehold terminated prepetition because of unlawful activity occurring on a portion of the small tract sublet to Omie, Inc.

The lease agreement between the Partnership and its original lessee, PISCO's predecessor in interest, provides in part, "This lease may be assigned or the leased premises may be sublet in whole or in part for any lawful purpose at the will of the Lessee. However, the Lessee shall remain liable to Lessor for lease payment and payment of taxes." The lease agreement is silent concerning default, forfeiture, and remedies for breach, except that it provides for the recovery of an attorney's fee "[s]hould the Lessor be forced to undertake legal action to enforce its rights upon the breach of the obligations of this lease."

United States Bankruptcy Judge Richard Stair, Jr. heard oral argument from the movants and the intervenors on July 14, 1989. Judge Stair ruled on the motions in a memorandum filed on September 15, 1989. Judge Stair denied the Partnership's motion for relief from the stay, and granted PISCO's motion under 11 U.S.C. § 365 to assume the unexpired lease. The Partnership then appealed to this Court, designating three issues on appeal.

The first designated issue is whether the transaction between the Partnership's original lessee and Orange Tee, Inc. with respect to the 5.71-acre tract was a transfer of the original lessee's rights under its sublease agreement with

Omie, Inc., or whether it was instead a "transfer of all of the rights and all of the obligations of [the original lessee] acquired and assumed by [the original lessee]" with respect to the 5.71-acre tract. The second issue is whether the language in the lease agreement between the Partnership and its original lessee, that "this lease may be assigned or the leased premises may be sublet in whole or in part," permitted a partial assignment of the leasehold, such as what PISCO contends occurred in the transaction between the original lessee and Orange Tee, Inc., relieving PISCO, as a subsequent assignee, from any responsibility for any unlawful activity on the 5.71-acre tract. The third issue designated by the Partnership is, "Does the filing of a voluntary petition in bankruptcy by a lessee pretermit any rights which such a lessee would otherwise have to notice from the lessor of the fact of a breach of the lease which occurred prior to the date on which the petition was filed?"

In briefs and at the oral argument before this Court on February 22, 1990, the appellees noted that the Partnership failed to raise in its designation of the issues on appeal the issues of whether PISCO's lease was terminated prepetition in the absence of any prepetition act on the part of the Partnership to terminate it, and whether PISCO's lease was subject to unilateral termination under Tennessee law, given the absence of an express provision in the lease agreement between the Partnership and PISCO's predecessor in interest specifying he manner and/or means by which termination or forfeiture is to occur, or specifying any right of reentry or repossession. Judge Stair dealt with these issues in his well written memorandum, and decided them against the Partnership. The Partnership argued before this Court that the Court has plenary appellate jurisdiction to decide issues other than those designated by a bankruptcy appellant.

There is authority for the Partnership's position. *In re Cohoes Industrial Terminal, Inc.*, 90 Bankr. 67, ____ (S.D.N.Y. 1988) (citation omitted). This Court believes that

the better rule is to address only the issues designated, given the notice function served by Bankruptcy Rule 8006. Nevertheless, this Court will consider these issues on this appeal, in consideration of the emphasis which Judge Stair placed on them, and of the fact that one or both of them might be dispositive of the appeal.

Judge Stair noted in his memorandum, "It is undisputed that the Partnership took no action [prepetition] to terminate the lease." The Partnership asserted that PISCO's lease was terminated because of two reasons, the asserted unlawful use of a portion of one tract referred to above, and the fact that real property taxes on the demised premises were due and unpaid on the date PISCO filed its petition for relief. Judge Stair ruled that, under Tennessee law, "[a]ffirmative conduct is required by a lessor to terminate a nonresidential lease which lacks a forfeiture clause."

Judge Stair stated the law correctly. In *Planters Insurance Co.* v. *Diggs*, 67 Tenn. 563 (1876), the property in issue was leased to one who built tenement buildings on it. The lease agreement required the tenant to pay the real property taxes on the demised premises, and stated that his failure to pay these taxes would cause a termination of the lease and a right of reentry on the part of the landlord, with a forfeiture of the tenement buildings. The tenant paid some of the taxes due late, after the expiration of the lease, and the landlord claimed a forfeiture fo the tenement buildings.

The Tennessee Supreme Court, after stating the disfavor with which courts view forfeitures, held that the forfeiture clause in the parties' agreement could only be enforced by affirmative action on the part of the landlord, i.e., reentry, while the collateral condition, the payment of the real property taxes, remained unfulfilled. *Id.* at 568-69. *Accord*, *Allen* v. *Dent*, 72 Tenn. 677, 680-81 (1880).

Modern case law is consistent.

> We hold that when a contract requires a thing to be done under penalty of forfeiture in a reasonable

> period of time under the circumstances and the parties have not agreed as to what constitutes such a time period, any declaration and notice of impending forfeiture must be clearly and unequivocally made so that the party seeking to avoid a forfeiture will have the opportunity to cure the forfeiture by complying with the other's demands or to seek injunctive relief to contest the unilateral decision by one of a "reasonable period under the circumstances."

Turner v. *Yow*, 657 S.W.2d 94, 97 (Tenn. App.), *permission to appeal denied, id.* (Tenn. 1983). "Conditions not included in the notice of default cannot properly serve as a basis for forfeiture." *Hooton* v. *Nacarato GMC Truck, Inc.*, 772 S.W.2d 41, 45 (Tenn. App.), *permission to appeal denied, id.* (Tenn. 1989).

If affirmative action is required of a landlord to enforce a written forfeiture clause, then *a fortiori* some sort of affirmative action, at least a demand, is required before a court will allow a landlord to terminate an unexpired lease for a breach of a covenant when the lease agreement contains no forfeiture or other default clause. If a tenant under a lease agreement which contains a forfeiture clause is entitled to notice of impending forfeiture and of the breaches asserted to justify the forfeiture, then a tenant under a lease agreement which contains no forfeiture or other default clause is entitled to such notice. These rules are grounded on the policy that a forfeiture should not be enforced without providing to the party subject to the forfeiture an opportunity to cure any nonperformance which might otherwise justify the forfeiture. This policy is stronger in the case of an agreement which is silent concerning forfeiture or any other remedy for default, since the party subject to the forfeiture does not receive from the language of the agreement any warning of the possibility of the forfeiture.

The case law relied upon by the Partnership is inapposite. In *Pizza Pumps of America, Inc.* v. *Krispy Kreme Doughnut*

Corporation, 11 T.A.M. 52-13 (Tenn. App. 1986), the parties' lease agreement, as construed by the Court of Appeals, provided in part, "[T]his Lease may be forfeited and thereby become null and void at the option of the lessor, and the said Lessor may immediately . . . reenter the said Premises . . . and repossess the same . . ." upon a default in the payment of rent. The lease agreement stated unequivocally that no extensions of time within which to pay rent would be permitted.

The lease agreement in *In re Memphis-Friday Associates*, 88 Bankr. 830 (Bankr. W.D. Tenn. 1988), stated a cure period applicable in the event of default in the payment of rent, and provided that the lessor could, after the expiration of the cure period without cure, serve a notice of termination on the lessee, specifying the date of termination. The lessor complied with this notice provision in the *Memphis-Friday Associates* case. The Bankruptcy Court held that the lessor, having complied with the notice provision, did not have to reenter, to commence a suit for possession, or obtain a writ of possession in order to terminate the lease. The Bankruptcy Court did not hold that it was unnecessary to give the lessee notice of the termination.

The issue of notice was not reached in *Murphy* v. *Reynolds*, 212 S.W.2d 686, 690 (Tenn. App.), *cert. denied*, *id.* (Tenn. 1948). The issue was neither pleaded nor otherwise raised in the trial court, and the Court of Appeals refused to consider it.

Judge Stair therefore ruled correctly that PISCO's leasehold had not been terminated on or before the date of PISCO's filing of its petitin for relief, because of the lack of any affirmative action on the part of the Partnership to terminate it. The Partnership argues, however, that if Judge Stair stated the general rule accurately, which the Partnership does not concede, he overlooked an exception which applies to cases like this, in which the tenant was in default at the time of the filing of its petition for relief, and the landlord

was prevented by the tenant's bankruptcy from giving any notice or from making any demand. According to the Partnership,

> [T]he filing of the bankruptcy petition by a lessee who, before filing, had defaulted actuates the common law of Tennessee which requires that the relationship between the bankrupt lessee and the lessor be interpreted, in retrospect, as if there had been an explicit agreement between them that, upon default, the lease, then and there, terminated.

Appellant's Reply to the Brief of Appellee, Fleet National Bank [doc. 11] at 18.

The appellant relies on *Elder* v. *Epperson*, 173 Tenn. 219, 116 S.W.2d 1015 (1938), which, as construed by the Tennessee Supreme Court in *Barnett* v. *Dooley*, 186 Tenn. 611, ____, 212 S.W.2d 598, 600 (1948), is asserted to stand for an exception to the common-law rule requiring demand in order to effect a forfeiture of a lease for default in the payment of rent in any case in which the tenant files a petition in bankruptcy before the expiration of the time within which demand must be made, because "the law does not require an idle gesture." It is questionable whether the *Barnett* v. *Dooley* reading of *Elder* is correct, since what happened in the older case was that the tenant filed her petition in bankruptcy, and her attorney immediately notified her landlady that the rent due on the date of the filing of the petition would not be paid. Furthermore, the Supreme Court in *Elder* stated a contractual ground for its decision, separate from the fact of the tenant's bankruptcy:

> The lease provided that in case of default in payment of rent thirty days the lessor could declare the lease at an end and take possession of the property at once. That provision of the lease gave the lessor the right to terminate it upon the lesseee's failure to pay the rent. The agreement of the parties operated to end the term

> upon non-payment of rent without the ceremony preceding re-entry and forfeiture.

Elder v. *Epperson*, 173 Tenn. 219, ____, 116 S.W.2d 1015, 1017 (1938) (citations omitted).

Accepting the *Barnett* v. *Dooley* reading of *Elder* as an accurate statement of Tennessee law, however, the Court is faced with the question whether this pre-Bankruptcy Code law continues to be enforceable in light of the supreme federal law expressed in 11 U.S.C. § 365(c)(3) and related provision, which allow a debtor-in-possession to assume an unexpired lease of nonresidential real property unless the lease "has been terminated under applicable nonbankruptcy law prior to the order for relief." *See also* § 365(b)(2)(B), which effectively renders a default-upon-bankruptcy clause unenforceable.

"Section 365 of the Code only gives a debtor the right to assume an executory contract. If a contract has been terminated pre-bankruptcy, there is nothing left for the debtor to assume. However, the termination must be complete and not subject to reversal, either under the terms of the contract or under state law." *Moody* v. *Amoco Oil Company*, 734 F.2d 1200, 1212 (7th Cir.), *cert. denied*, 469 U.S. 982 (1984) (citations omitted).

The Court is able to avoid this possible conflict between Tennessee real property law and federal bankruptcy law if Judge Stair concluded correctly that Tennessee law does not permit the unilateral termination of a lease for a breach of one or more lease covenants in the absence of a termination or forfeiture clause in the lease agreement. If this conclusion is correct, then the *Elder* v. *Epperson* exception to the common-law rule cannot be of any help to the Partnership, because it is undisputable that the lease agreement between the Partnership and PISCO's predecessor in interest is silent concerning default, forfeiture, and remedies for breach.

And demand or notice of termination of the lease made by the Partnership, whether or not prevented by PISCO's bankruptcy, would indeed have been ineffective to work a

forfeiture of this lease. In the absence of a lease agreement clause providing for the termination of the lease, even a failure to pay rent cannot work a forfeiture of the lease. *Greene* v. *Donnell*, 11 Tenn. App. 366, 371, *cert. denied*, *id.* (Tenn. 1930) (citation omitted). This is consistent with the prevailing rule in American law:

> In the absence . . . of an express stipulation or proviso to that effect, the general rule is that the breach by the lessee of the covenants or stipulations on his part contained in the lease does not work a forfeiture of the term, and that the lessor's remedy is by way of a claim for damages. In the absence of a stipulation for a forfeiture, a lessee does not forfeit his term by the non-payment of rent or of taxes which he has covenanted to pay. Nor will a forfeiture be decreed because of a violation of a covenant not to sublet or assign, or even because of an illegal use of the demised premises, although any of such things may by the terms of the lease be made grounds of forfeiture. . . .

49 AM. JUR. 2D, *Landlord and Tenant* § 1020 (1970) (footnotes omitted).

This conclusion means that the third issue on appeal designated by the Partnership, whether the commencement of a voluntary case in bankruptcy by a lessee "pretermit[s] any rights which such a lessee would otherwise have to notice from the lessor of the fact of a breach of the lease which occurred [prepetition]," is itself pretermitted. It is also unnecessary for this Court to decide the sublease/assignment issue regarding the 5.71-acre tract, since whether or not PISCO has any responsibility as the Partnership's tenant for any unlawful activity which is occurring on this small tract, neither such unlawful activity nor any failure to pay real property taxes when due could have worked a forfeiture of this lease in the absence of PISCO's bankruptcy. Applying a *de novo* standard of review to Judge Stair's conclusions, this

Court finds them correct, and will affirm the decision of the Bankruptcy Court.

ENTER:

/s/ LEON JORDAN
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

No. CIV 3-89-0827

In re PIONEER INVESTMENT SERVICES COMPANY,
Debtor,

THE CAIN PARTNERSHIP, LTD.,
Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY, et al.,
Appellees.

ORDER
(Filed March 26, 1990)

In accordance with the Court's Memorandum Opinion filed simultaneously with this Order, the Order entered September 15, 1989 by the United States Bankruptcy Court for the Eastern District of Tennessee in the debtor's case in bankruptcy, denying The Cain Partnership, Ltd.'s motion for relief from the automatic stay, and granting the debtor's motion to assume the lease evidenced by the lease agreement dated April 11, 1974 (as subsequently amended) between The Cain Partnership, Ltd. and Colonial Enterprises, Inc., is AFFIRMED.

ENTER:

/s/ Leon Jordan
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

NO. CIV-3-89-0827

In re PIONEER INVESTMENT SERVICES COMPANY,
Debtor-in-Possession,

THE CAIN PARTNERSHIP, LTD.,
Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY, et al.,
Appellees.

MEMORANDUM OPINION
(Filed May 23, 1990)

This is an appeal from a decision of the United States Bankruptcy Court for the Eastern District of Tennessee. The case is before the Court for its consideration of the appellant's motion for amendment of judgment and/or petition for rehearing. [Doc. 21.] For the reasons stated below, the Court will deny this motion.

The appellant requested in its motion that the Court hear oral argument on the motion, but the Court finds this unnecessary in light of the proceedings in this case to date. The appeal resulted from the Bankruptcy Court's decision under 11 U.S.C. § 365 (West 1979 and 1990 supp.) to allow the debtor-in-possession, Pioneer Investment Services Company ("PISCO"), to assume an unexpired lease, and to deny the motion of the appellant landlord, The Cain Partnership, Ltd. ("the Partnership"), for relief from the automatic stay im-

posed by 11 U.S.C. § 362 (West 1979 and 1990 supp.) for the purpose of taking possession of the demised premises. The parties briefed the issues on appeal more than adequately.

This Court heard oral argument in this case on February 22, 1990. The Court ruled on the issues presented in a Memorandum Opinion and Order filed on March 8, 1990 (Docs. 19 and 20.] The Partnership filed the motion under consideration soon after, on March 19. The Partnership accompanied its motion with a brief more than 30 pages long [doc. 21A], a supplemental brief 14 pages long [doc. 22], and an appendix containing 465 pages of copies of various judicial opinions and other authorities. [Doc. 23.]

Almost all of the Partnership's argument is reargument of issues and contentions presented to the Court during the first round of briefing and at the oral argument. The Court is of the opinion that it gave adequate consideration to these issues and contentions, and reached a correct decision in its Memorandum Opinion and Order filed earlier. Therefore, the Court will deny the Partnership's motion to the extent that it seeks reconsideration of issues already briefed.

The Partnership also argues that the Court should amend its earlier opinion to delete the holding that, before a landlord can terminate unilaterally a lease for a tenant's breach of a covenant, such as a covenant not to make any unlawful use of the demised premises, there must be a termination or forfeiture clause in the parties' lease agreement. The Partnership argues, without conceding the correctness of this holding, that it was unnecessary to the Court's decision of this case, and that it will cause the Partnership difficulties in some State-court litigation with other parties interested in a portion of the same demised premises in issue here.

The Bankruptcy Court identified this issue, the necessity of a termination or forfeiture clause in a lease agreement under the circumstances presented in this case, as one of three issues to be addressed by the parties. The Partnership, the appellant, did not state it under Bankruptcy Rule 8006 as an issue on appeal, but argued at the oral argument that this Court has plenary appellant jurisdiction to consider all issues.

This Court decided the issue because it was an important part of the Bankruptcy Court's decision, and because it had the potential to be dispositive of the appeal.

Furthermore, by holding as it did, the Court sought to avoid a possible conflict between Tennessee law as expressed in *Elder* v. *Epperson*, 173 Tenn. 219, 116 S.W.2d 1015 (1938), as construed in *Barnett* v. *Dooley*, 186 Tenn. 611, 212 S.W.2d 598 (1948), and the supreme federal bankruptcy law permitting the debtor-in-possession's assumption of an unexpired lease of nonresidential real property in the absence of a prepetition termination under applicable nonbankruptcy law. *See* 11 U.S.C.A. § 365(c)(3) (1990 supp.). The Partnership argued that, if it was required under Tennessee law to take some prepetition action to terminate PISCO's lease, it was relieved from this requirement by PISCO's filing of its petition for relief under chapter 11 of the Bankruptcy Code. The Court held that the Partnership could not rely upon *Elder* v. *Epperson*, *supra*, when the parties' lease agreement contained no termination or forfeiture clause.

The Court is of the opinion that it decided this issue correctly, and that there is no good reason to amend its opinion filed earlier in this case.

The Court will consider one more argument made by the Partnership, which was not advanced before. The Partnership argues that Tennessee Code Annotated §§ 66-7-105 (1982 repl. vol.) and 29-3-101(a) (1980 repl. vol.) worked a forfeiture of the lease without any action on the part of the Partnership. To quote from the Partnership's brief,

> [I]t goes without saying that, where a lease terminates by statute because of unlawful use, prior notice by the lessor is alleviated. In fact, prior notice is impossible. Such forfeitures occur because of unlawful uses prohibited by statute, and, unless the statute makes provision for an opportunity to cure, the termination is final and automatic.

[Doc. 21A, pp. 26-27.]

The problem with the Partnership's argument is that the statutes cited do not go as far as the Partnership would have them go. T.C.A. § 66-7-105 declares leases of real estate used for certain purposes, such as the sale of obscene material, against public policy and not enforceable, and goes on to say that any lessor of real estate for one of the prohibited purposes "shall not be entitled to use the courts or legal processes of this state to enforce said lease or rental contract or to collect rentals or any other consideration thereon." Aside from the obvious facts that this is a case in which a lessee, not a lessor, seeks to assume the lease, and that neither this Court, sitting as a bankruptcy appeals court, nor the Bankruptcy Court is a Tennessee court, it must be noted that nothing in the statute causes a lease to be terminated or forfeited automatically, without any action by either party to invoke the statute. It appears from the statutory language that the General Assembly referred to the legal enforceability of such a lease, rather than to the termination or forfeiture of it, because the purpose of the statute is to prevent one from engaging in one or more of the prohibited acts indirectly, i.e., by demising his or her premises to another for the purpose of engaging in one or more of the same prohibited acts.

The second statute cited, T.C.A. § 29-3-101(a)(1), helps the Partnership even less. It defines the terms "nuisance" and "lewdness" for the purposes of T.C.A. Title 29, ch. 3, which concerns the abatement of nuisances. This chapter sets out a specific procedure to be followed in seeking the abatement of a nuisance. *See, e.g., State ex rel. Webster* v. *Daughtery*, 530 S.W.2d 81 (Tenn. App.), *cert. denied, id.* (Tenn. 1975). The remedy provided is abatement, not the termination or forfeiture of the lease. T.C.A. § 29-3-110.

"Forfeitures are not favored by the law. Statutes purporting to authorize forfeiture are strictly construed and justify permanent confiscation only when the facts fall within both the letter and spirit of the statute." *Blackmon* v. *Norris*, 775 S.W.2d 367, 369 (Tenn. App.), *permission to appeal denied, id.* (Tenn. 1989) (citations omitted) (discussing a Department

of Corrections policy providing for the forfeiture of money in the possession of an inmate).

The Partnership argues somewhat heatedly in its brief in support of its motion now under consideration that a hypothetical result of the Court's holding is, in a case in which the pertinent lease agreement contains no termination or forfeiture clause, and in which law enforcement officers having jurisdiction fail or refuse to act, that a landlord is powerless to interfere with, to prevent, or to terminate an unlawful use of demised premises. Yet T.C.A. § 29-3-102 states that a suit for the abatement of a nuisance may be brought upon the relation of 10 or more citizens and freeholders, and § 29-3-114 gives a single plaintiff in a suit to recover special damages for a nuisance standing to petition for the abatement of it.

Neither of the statutes relied upon by the Partnership, then, worked an automatic termination or forfeiture of PISCO's lease. Perhaps the Partnership could have used one, or both, to achieve that end, but it did not do anything prepetition to initiate any proceeding by which to terminate the lease. Neither § 66-7-105 nor § 29-3-101 provides a ground for changing the Court's earlier ruling that PISCO's lease was not terminated when it filed its petition for relief because the Partnership had not taken any affirmative, prepetition action to terminate it.

This is consistent with some of the authorities included in the addendum filed by the Partnership. [Doc. 23.] In *In re Club 99, Inc.*, 82 Bankr. 166 (D.D.C. 1988), the lease agreement provided that a failure to comply with any covenant (the lease agreement contained a covenant against use for disorderly or unlawful purposes or for any illegal business) was a default, upon which the landlord had an option to terminate the lease at any time. Some time before the tenant debtor filed its petition for relief, the landlord commenced a proceeding in the District of Columbia Superior Court to recover possession of the demised premises for breach of this covenant. Through no fault of the landlord, the Superior Court continued the hearing of this proceeding several times,

so that it was not completed before the commencement of the tenant's case in bankruptcy. The District Court held that the lease had been terminated prepetition under applicable non-bankruptcy law (*i.e.*, District of Columbia law) because there was both a breach of a lease covenant and a manifestation by the landlord of an intent to terminate the lease because of the breach.

In *Schwartz* v. *McQuaid*, 214 Ill. 357, ____, 73 N.E. 582, 584 (1905), the Illinois Supreme Court stated, "While it is true that [the lessee] used [the demised premises] for an illegal purpose, and that fact might authorize the lessor to avoid the lease, yet the lessee would be entitled to his day in court before he could be deprived of the benefits of his lease." In *Voght* v. *State*, 124 Ind. 358, ____, 24 N.E. 680, 681-82 (1890) (citations omitted), the Indiana Supreme Court, in the course of discussing how a landlord might escape statutory criminal liability for renting premises used for gambling, stated, "The mere fact that a tenant uses premises for an unlawful purpose does not of itself avoid the lease, but the landlord may apply to a court of equity to restrain the tenant, and to avoid or forfeit the lease."

Planters Insurance Company v. *Diggs*, 67 Tenn. 563, 568 (1876), continues to be an authoritative statement of the Tennessee law "that the forfeiture [of a lease for breach of a lease covenant] is to be enforced at the option of the lessor, and by an affirmative act on his part, that is by re-entry for such purpose, based on failure to perform or breach of the conditions, and do (sic: does) not take effect until this is done." Neither *Bank of Commerce & Trust Co.* v. *Burke*, 135 Tenn. 19, 185 S.W. 704 (1916), nor *Heart* v. *East Tennessee Brewing Company*, 121 Tenn. 69, 113 S.W. 364 (1908), cited by the Partnership, is authority to the contrary. In the former case, the landlord was barred from collecting rents by the demise of the premises for an illegal purpose, the operation of a saloon. In the latter, the landlord was similarly denied the right to recover rents when the premises were demised for the express purpose of operating a saloon, and this purpose became illegal during the term of the lease.

Therefore, assuming only for the purposes of the Partnership's argument that, when PISCO filed its petition for relief, unlawful activity was occurring on a part of the Partnership's land for which PISCO was responsible, the Partnership is not entitled to invoke any such unlawful activity to prevent PISCO's assumption of its lease, because the Partnership did not take any prepetition action to manifest its intent to terminate the lease for breach of the covenant against unlawful use or activity. *Elder* v. *Epperson*, 173 Tenn. 219, 116 S.W.2d 1015 (1938), and *Barnett* v. *Dooley*, 186 Tenn. 611, 212 S.W.2d 598 (1948), do not enable the Partnership to treat any attempted postpetition termination of this lease as a prepetition termination for the purposes of § 365(c)(3) of the Bankruptcy Code. The *Elder* v. *Epperson* exception to the common-law rule requiring a demand for unpaid rent on the day it is due does not allow a creditor to do nothing prepetition about a claimed breach of a collateral covenant in a lease, then assert the alleged breach for the first time in the tenant's case in bankruptcy.

In light of this disposition of the Partnership's motion, it is unnecessary to address whether the fact that PISCO, after the filing of this Court's earlier Memorandum Opinion and Order, obtained superpriority secured financing under 11 U.S.C. § 364 (West 1979 and 1990 Supp.), without opposition or an appeal by the Partnership, so change the circumstances in this case as to render the Partnership's motion moot. [See docs. 25, 25A, 26, 27 and 28.] The Court will deny the Partnership's motion for amendment of judgment and/or petition for rehearing.

ENTER:

/s/ Leon Jordan
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHERN DIVISION

NO. CIV-3-89-0827

In re PIONEER INVESTMENT SERVICES COMPANY, Debtor-in-Possession.

THE CAIN PARTNERSHIP, LTD., Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY, et al., Appellees.

ORDER
(Filed May 23, 1990)

For the reasons stated in the Memorandum Opinion filed simultaneously with this Order, the Court finds The Cain Partnership, Ltd.'s motion for amendment of judgment and/or petition for rehearing [doc. 21] not well taken, and it is DENIED.

ENTER:

/s/ LEON JORDAN
United States District Judge

APPENDIX H

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

Case No. 3-89-01058

In re

PIONEER INVESTMENT SERVICES COMPANY
Debtor

ORDER
(Received November 5, 1990)

For the reasons set forth in the court's memorandum opinion dictated orally from the bench on October 31, 1990, the "Motion Of The Cain Partnership, Ltd., Pursuant To *Bankruptcy Rule* 9024 And *Federal Rules of Civil Procedure*, Rule 60(b)(4), To Vacate The Orders Entered On September 15, 1989 Denying The Motion Of The Cain Partnership, Ltd. To Lift The Stay And Permitting Debtor To Assume The Colonial Lease" filed by the Cain Partnership, Ltd., on October 5, 1990, is DENIED.

SO ORDERED.

ENTER: October 31, 1990
BY THE COURT

/s/ RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY
JUDGE

APPENDIX I

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

Case No. 3-89-01058

IN RE:

PIONEER INVESTMENT SERVICES CO.,
A/K/A PREMIERE RESTAURANT
INVESTMENT COMPANY,

Debtor.

MEMORANDUM OPINION
October 31, 1990
(Received November 16, 1990)

BEFORE THE HONORABLE RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

FOR THE DEBTOR:
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FOR THE CAIN PARTNERSHIP, LTD.:
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FOR FIRST TENNESSEE BANK:
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FOR FLEET NATIONAL BANK:
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FOR FIRST NATIONAL BANK OF LOUISVILLE:
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FOR PAUL D. POWSNER:
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First Tennessee Bank Building
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FOR THE UNITED STATES TRUSTEE:
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FOR THE CREDITORS' COMMITTEE:
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FOR JOHN WEAVER, TRUSTEE:
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FOR GENEFIN S.A.:
RICHARD A. SEDGLEY, ESQ.
7212 Kingston Pike
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MERILYN B. DUNN, COURT REPORTER
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(615) 637-4087

[3] *THE COURT*: I have before me two motions filed by The Cain Partnership Limited. I will deal with these motions independently. The Cain Partnership Limited filed a motion on October 5, 1990, pursuant to Federal Rule of Civil Procedure 60(b)(4), incorporated into Federal Rule Bankruptcy Procedure 9024, seeking to set aside an order of this Court entered September 15, 1989. This order denied the partnership's motion filed May 25, 1989, seeking termination of the automatic stay of 11 U.S.C. § 362(a) to permit it to repossess and reenter the debtor's leasehold premises consisting of approximately 86.54 acres situated in Knox County, Tennessee. The September 15, 1989 order also granted the debtor's motion filed May 18, 1989, that it be permitted to assume that certain lease between the partnership, as lessor, and Colonial Enterprises, Inc., as lessee, dated April 11, 1974, as amended April 1, 1977, said lease as amended having been assigned in part to Premiere Investment Properties, Inc. on July 17, 1984, said lease having been further assigned by Priemiere Investment Properties, Inc. to the debtor on April 13, 1987. The partnership requests the Court to vacate its September 15, 1989 order which has been affirmed by the District Court and is presently on appeal to the United States Court of Appeals for the Sixth [4] Circuit.

In support of its Rule 60(b)(4) motion, the partnership contends that the order is void and should be vacated because the Bankruptcy Court lacked the subject matter jurisdiction to enter an order affecting the leasehold property. Fleet National Bank and the debtor filed memorandums in opposition to the partnership's Rule 60(b)(4) motion. The partnership correctly relies upon *Flynt* v. *Brownfield, Bowen & Bally*,726 F. Supp. 1106, a 1989 District Court decision out of the Southern District of Ohio, in stating that the Sixth Circuit permits lower courts to consider Rule 60(b) motions pending an appeal. The lower court, however, possesses only limited or residual jurisdiction to consider a Rule 60(b) motion and cannot grant a party a new trial or reconsider the merits of its order. The Sixth Circuit has stated: "As a general rule the filing of a notice of appeal divests the district court of jurisdic-

tion and transfers jurisdiction to the court of appeals. This, however, is not an inflexible rule. . . . Thus this court has consistently held that a district court retains jurisdiction to proceed with matters that are in aid of the appeal." *Cochran* v. *Birkel*, 651 F.2d 1219 at 1221. That is a 1981 decision out of the Sixth Circuit and I have omitted citations in support of the quote.

[5] The holding in *Cochran* is consistent with the traditional rule that the lower court is divested of jurisdiction except to take action in aid of an appeal. *See Rucker* v. *United States Department of Labor*, 798 F.2d 891, a 1986 Sixth Circuit decision; *First National Bank* v. *Hirsch*, 535 F.2d 343, a 1976 Sixth Circuit decision; and *Berndt* v. *Stinson*, 562 F. Supp. 28, a 1982 District Court decision out of the Eastern District of Tennessee, in which the Sixth Circuit dismissed an appeal, 708 F.2d 721.

A Rule 60(b) motion dealing only with the jurisdiction of the Court to enter the challenged order may be considered to be in aid of the appeal and, therefore, resolved by the Trial Court notwithstanding a filing of a notice of appeal. *See Willie* v. *Continental Oil Company*, 746 F.2d 1041, a 1984 Fifth Circuit decision. The Trial Court cannot, however, reconsider the merits of its order. *Schechter* v. *McTigue* (In re Trempe), 1990 Westlaw, 70043, a May 10, 1990 decision out of the District Court for the Northern District of Illinois.

By its motion, the partnership attacks the subject matter jurisdiction of the Bankruptcy Court to enter the September 15, 1989 order which allowed the debtor to assume the disputed Colonial lease. This Court had subject matter jurisdiction to determine the partnership's automatic stay motion and it likewise had [6] jurisdiction to determine the debtor's motion to assume the lease. The debtor was in possession of the leasehold property pursuant to the provisions of the April 11, 1974 lease, as amended, between the partnership and Colonial as assigned to it on April 13, 1987. The partnership stipulated the authenticity and admissibility of numerous documents, including its April 11, 1974 lease with Colonial, as amended, and the various assignments through which the

debtor became the lessee under the lease. The partnership further stipulated that it took no action prior to the filing of the debtor's Chapter 11 petition to terminate the Colonial lease.

The Bankruptcy Court's jurisdiction is defined under 28 U.S.C. § 1334 and 28 U.S.C. § 157. Section 1334(a) confers original and exclusive jurisdiction over all cases under Title 11 in the District Court. Section 1334(b) confers original but not exclusive jurisdiction in the District Court of all civil proceedings arising under or related to cases under Title 11. Section 157 of Title 28 allows each District Court to "provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." Section 157(b) empowers Bankruptcy Judges to enter [7] appropriate orders and judgments in all core proceedings. Core proceedings are those intrinsic to the adjustment of debtor-creditor relationships involved in bankruptcy relief. *In re Marine Iron & Shipbuilding Company*, 104 B.R. 976, a 1989 District Court decision out of the District of Minnesota.

Section 157(b)(2), at Paragraphs G and M, respectively, expressly provides that core proceedings include "motions to terminate, annul, or modify the automatic stay" and "orders approving the use or lease of property." The automatic stay and lease assumption issues before the Court which led to entry of the September 15, 1989 order are undisputedly core issues cognizable by the Bankruptcy Judge under 28 U.S.C. § 157(b). Clearly, this Court had subject matter jurisdiction to enter its order denying the partnership's motion for stay relief and granting the debtor's motion to assume the Colonial lease.

In *Trempe*, previously cited, a creditor filed a motion seeking to vacate a default judgment as void pursuant to Rule 60(b)(4) contending that the Court did not have subject matter jurisdiction to enter the judgment. The trustee had obtained a default judgment on a suit to recover a preferential transfer. The creditor alleged, as does the partnership, that

the [8] Bankruptcy Court lacked subject matter jurisdiction because the property in question was not property of the estate. The District Court held that the Bankruptcy Court had jurisdiction over the parties and subject matter pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157(b) since the action was a core proceeding. The District Court stated: "The jurisdictional question for the bankruptcy court is whether the trustee brought an action to avoid a preference. The question whether property is property of the estate goes to the merits of the complaint."

The jurisdictional question mandated by 28 U.S.C. § 157(b)(2) is resolved by a two-fold inquiry insofar as the instant proceeding is concerned: One, did the debtor file its motion pursuant to 11 U.S.C. § 365 for approval of the assumption of the Colonial lease; two, did the partnership file its motion for automatic stay relief pursuant to 11 U.S.C. § 362. This Court, through its September 15, 1989 order, answered these questions in the affirmative. I made a specific finding in the memorandum filed in support of my September 15, 1989 order that the matters raised by the partnership's automatic stay motion and the debtor's motion to assume the Colonial lease were core proceedings. This Court acted within the jurisdictional scheme defined under 28 U.S.C. § 1334 and 28 U.S.C. § 157.

[9] Through its current motion, the partnership argues that the Colonial lease was not part of the debtor's estate as a result of its pre-petition termination and, therefore, the motions resolved by the September 15, 1989 order did not constitute core proceedings. The partnership argues that core proceedings must involve property of the estate to confer jurisdiction upon the Bankruptcy Court. The partnership contends that the debtor was not in possession of the leasehold estate. It argues that legal title to the leasehold estate had been conveyed by the debtor by a deed of trust to its various lenders and that therefore the debtor cannot be viewed to have been or to be in possession of the premises such that the Bankruptcy Court could exercise jurisdiction. This argument

ignores the beneficial interest of the debtor in the property and its actual physical possession and control thereof.

11 U.S.C. § 541(a)(1) defines property of the estate broadly as "all legal or equitable interests of the debtor in property as of the commencement of the case." The Bankruptcy Court undisputedly has jurisdiction to determine what is property of the estate. *See In re Gull Air, Inc.*, 890 F.2d 1255, a 1989 First Circuit case; *In re Prudential Lines, Inc.*, 107 B.R. 832, a 1989 Bankruptcy Court decision out of the Southern District of New York; *In re Tudor Motor Lodge Associates*, 102 B.R. 936, [10] a 1989 Bankruptcy Court decision out of the District of New Jersey.

Since the debtor asserted an interest in the Colonial lease, the Bankruptcy Court had subject matter jurisdiction to determine the merits of the partnership's automatic stay motion and the debtor's motion for approval to assume the Colonial lease. *See In re Xonics, Inc.*, 813 F.2d 127, a 1987 Seventh Circuit decision. Similarly, the Bankruptcy Court had jurisdiction to determine whether or not the Colonial lease had been terminated pre-petition. *See generally In re Waterkist Corporation*, 775 F.2d 1089, a 1985 Ninth Circuit decision; *In re Acorn Investments*, 8 B.R. 506, a 1981 Bankruptcy Court decision out of the Southern District of California; and *In re Aries Enterprises, Limited*, 3 B.R. 472, a 1980 Bankruptcy Court decision out of the District of Columbia.

The question of whether the lease had terminated pre-petition and/or was property of the estate goes to the merits of the motions originally filed by the partnership and the debtor which led to this Court's September 15, 1989 order. *See generally Franklin Computer Corporation*, 60 B.R. 795, a 1986 Bankruptcy Court decision out of the Eastern District of Pennsylvania, and *In re Nettie Lee Shops of Bristol, Inc.*, 49 B.R. 946, a 1985 Bankruptcy Court decision out of the Western District of [11] Virginia.

The partnership's motion, ostensibly filed under Rule 60(b)(4), appears in reality to be merely an effort to reargue

and restate its theory that the debtor's lease was terminated pre-petition and was, therefore, not property of the estate. The motion improperly challenges this Court's prior determination that the lease had not been terminated pre-petition and was, therefore, subject to assumption by the debtor. The partnership's Rule 60(b)(4) motion raises the identical issues resolved by the Court through its September 15, 1989 order. The partnership's Rule 60(b)(4) motion seeking to vacate the September 15, 1989 order for lack of jurisdiction is without merit and will be denied.

The second matter before me involves a motion filed by The Cain Partnership Limited on September 28, 1990 requesting the Court to set aside its order entered March 1, 1990 authorizing the debtor to incur secured debt and/or to enter into a post-petition financing agreement with Fleet National Bank. Under the terms of the March 1, 1990 order entered pursuant to 11 U.S.C. § 364(c), the debtor was authorized to enter into a post-petition loan agreement with Fleet which allowed the debtor to borrow sums not in excess of $847,000. The debtor was further authorized to execute [12] appropriate documents to effectuate the loan or loans, including loan documents, notes, loan agreements, and deeds of trust. Under the terms of the March 1, 1990 order, Fleet's post-petition loans were to be secured by first priority liens on the debtor's leasehold estate. The partnership, through the filing of its September 28, 1990 motion requests relief under Federal Rule Civil Procedure 60(b)(1) and/or (4) and/or (5) and/or (6), all of which are incorporated into Federal Bankruptcy Rule Procedure 9024. Fleet filed a response in opposition to the partnership's motion on October 11, 1990.

Circumstances leading to the entry of the March 1, 1990 post-petition financing order, while repetitious to what I have already stated in connection with the earlier motion, are as follows. On September 15, 1989, the Court entered the order authorizing the debtor to assume that certain lease between The Cain Partnership Limited, lessor, and Colonial Enterprises, Inc., lessee, dated April 11, 1974, as amended April 1, 1977, said lease as amended having been assigned in part to

Premiere Investment Properties, Inc. on July 17, 1984, said lease having been further assigned by Premiere Investment Properties, Inc. to the debtor on April 13, 1987. On February 2, 1990, the debtor filed a motion pursuant to 11 U.S.C. § 364(c) seeking authorization to incur secured [13] debt and enter into the post-petition financing arrangement with Fleet. An amendment to the debtor's financing motion was filed February 8, 1990. Notice of the filing of the debtor's § 364(c) motion as amended and of a hearing thereon held February 21, 1990 was provided all creditors and parties in interest, including The Cain Partnership. The partnership did not object to the motion. On March 1, 1990, the Court entered the order granting the debtor's motion. No appeal of the March 1, 1990 order was taken.

Fleet, in its memorandum in opposition to the partnership's motion, states that the post-petition loan authorized by the order was closed on March 29, 1990. It further avers that in accordance with the terms of the March 1, 1990 order, it has advanced funds to the debtor totaling more than $700,00. This loan, according to Fleet, is, pursuant to the financing order, secured by a lien prior in right and entitlement to all other existing liens on and claims against the leasehold estate. The Court accepts Fleet's averments as true and, indeed, these representations are not disputed by the partnership.

The partnership, six months after entry of the March 1, 1990 post-petition financing order, asserts that the order was based on a mistake of law. It contends it is, therefore, now entitled to have the March 1, 1990 order set aside. Bankruptcy Code § 364(e) provides: [14] "The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal." The Bankruptcy Court cannot reverse an authorization to obtain credit or

incur debt unless the lender did not act in good faith. *See Kham and Nate's Shoes No. 2, Inc.* v. *First Bank of Whiting*, 908 F.2d 1351, a 1990 Seventh Circuit decision. *See also In re Revco D.S., Inc.*, 901 F.2d 1359, a 1990 Sixth Circuit decision; *In re Ellingsen MacLean Oil Co., Inc.*, 834 F.2d 599, a 1987 Sixth Circuit decision.

In *Kham and Nate's Shoes No. 2*, the United States Court of Appeals for the Seventh Circuit stated: "There is an intermediate step, suggested by § 364(e), which provides that the reversal or modification of a financing order on appeal 'does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith.' In other words, a lender that extends credit in reliance on a financing order is entitled to the benefit of that [15] order, even if it turns out to be legally or factually erroneous. Although § 364(e) speaks only of modification on appeal, it instantiates the principle that bankruptcy judges may make binding commitments to give priority to new credit. If creditors fear that the rug will be pulled out from under them, they will hesitate to lend. So § 364(e) and companion provisions . . . disable courts from backtracking on promises in the absence of bad faith, which is a very narrow exception. . . . A bankruptcy court's modification of its own orders poses the same risks as does reversal on appeal. Accordingly, although § 364(e) does not apply by its own terms, its principle applies through the law of the case. A judge lacks the power to undo the priority granted by a financing order without first finding that the creditor acted in bad faith." That quotation is found at 908 F.2d at 1355, and I have omitted supporting authority.

The rationale behind the protection afforded lenders by Section 364(e) on appeal of a post-petition financing order is equally applicable to a request for relief under Rule 60(b). Rule 60(b) should not be a vehicle utilized to circumvent the clear intent of Section 364(e). A post-petition loan properly authorized under Section 364(a), (b), or (c) cannot be affected by a subsequent reversal or modification by the Bankruptcy Judge. [16] *See In re Blumer*, 66 B.R. 109, a 1986

decision out of the Ninth Circuit Bankruptcy Appellate Panel, which was affirmed without published opinion at 826 F.2d 1069.

The good faith requirement of Section 364(e) prohibits such a reversal or modification. Its principle holds true even if the financing order was entered erroneously or as a result of a mistaken view of the law. *See Kham and Nate's Shoes No. 2*, 908 F.2d at 1355. As noted by one Bankruptcy Court: "[T]here is an overriding interest in maintaining the integrity of the judicial process. The Court's orders approving the post-petition financing stipulations conferred a priority to [the bank] ahead of all administrative claims. The bank advanced funds to the trustee in reliance upon those orders. The Chapter 11 process would be undermined if this Court were to, in effect, undo those orders by placing the administrative claims of the creditors' committee ahead of the superpriority which [the bank] bargained for." *In re American Resources Management Corp.*, 51 B.R. 713 at 722, a 1985 Bankruptcy Court decision out of the District of Utah.

In its Rule 60(b) motion, the partnership has not alleged that Fleet acted in bad faith in extending a post-petition secured loan to the debtor. Nevertheless, it is clear that the only ground for setting aside or modifying an order entered pursuant to [17] Section 364(c) is lack of good faith. *In re Revco D.S., Inc.*, 901 F.2d 1359, which I previously cited; *In re Graphic Arts Lithographers, Inc.*, 71 B.R. 774, a 1987 decision out of the Ninth Circuit Bankruptcy Appellate Panel; *In re Ellingsen MacLean Oil Company*, 834 F.2d 599. Good faith has been defined by the Sixth Circuit as "honesty in fact in the conduct or transaction concerned." *In re Ellingsen MacLean Oil Company*, 834 F.2d at 605, quoting Uniform Commercial Code at Section 1-201(19).

There is no suggestion by the partnership that the March 1, 1990 financing order was the result of anything other than an arm's length transaction between the debtor and Fleet. The partnership's September 28, 1990 motion, insofar as it seeks relief under Rule 60(b)(4), suggests that the March 1, 1990 financing order is void to the extent it purports to affect the

debtor's leasehold estate derived under the April 11, 1974 Colonial lease as amended and as assigned to the debtor. In reality, it is this voidance theme which forms the entire basis of the partnership's motion. The arguments espoused by the partnership in the memorandums supporting its motion are identical to those asserted in its motion to vacate the September 15, 1989 order denying the partnership's motion to vacate the stay to permit it to re-enter and repossess the debtor's leasehold estate and authorizing [18] the debtor to assume the Colonial lease. This argument is rejected for the reasons previously stated in that portion of this memorandum dealing with the partnership's motion to vacate the September 15, 1989 order. Matters relating to obtaining credit under Section 364 are clearly core proceedings under 28 U.S.C. § 157(b)(2)(D). This Court had the jurisdiction to entertain the debtor's February 2, 1990 motion to incur secured debt under Section 364(c). It had jurisdiction to enter the March 1, 1990 financing order. The partnership's request for relief under Rule 60(b) seeking to set aside the March 1, 1990 financing order will be denied.

I will enter appropriate judgments on these motions, or appropriate orders. The orders will be entered separately. I will not enter consolidated orders. In the event these memorandums are transcribed, the court reporter will deliver the memorandums to me. I will supplement or amend my opinion, as I see fit. Upon filing of the signed memorandums, copies will, of course, be forwarded to counsel.

BY THE COURT:

/s/ RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

FILED: November 14, 1990, nunc pro tunc to October 31, 1990.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

NO. CIV-3-89-0827

In re PIONEER INVESTMENT SERVICES COMPANY,
Debtor-in-Possession.

THE CAIN PARTNERSHIP, LTD.,
Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY, et al.,
Appellees.

MEMORANDUM OPINION
(Filed November 6, 1990)

This bankruptcy appeal is again before the Court, for consideration of The Cain Partnership's Fed. R. Civ. P. 60(b)(4) motion [doc. 36] to vacate the Orders entered previously by this Court affirming the decision of the United States Bankruptcy Court for the Eastern District of Tennessee from which this appeal was taken. This Court first ruled in this bankruptcy appeal in a Memorandum Opinion [doc. 19] and Order [doc. 20] filed on March 8, 1990. The Court affirmed the decision of the Bankruptcy Court denying The Cain Partnership's motion for relief from the automatic stay and granting the motion of the debtor, Pioneer Investment Services Company ("Pioneer") to assume the lease in controversy in this contested matter. This Court ruled that Tennessee law requires an affirmative act by a lessor to terminate a lease in the absence of a written forfeiture clause, and ruled that the

failure of The Cain Partnership to act affirmatively prepetition to terminate the debtor's lease precluded The Cain Partnership from treating this lease as terminated. This Court also ruled that Tennessee law does not permit unilateral termination of a lease for breach of a covenant in the absence of a termination or forfeiture clause. On the basis of this ruling, the Court held that neither any unlawful activity on the demised premises nor Pioneer's failure to pay real estate taxes promptly as required by the applicable lease agreement worked an automatic termination or forfeiture of Pioneer's lease.

In a Memorandum Opinion [doc. 29] and Order [doc. 30] filed on May 23, 1990, this Court denied The Cain Partnership's motion to amend this Court's earlier decision and/or petition for rehearing. The Court rejected The Cain Partnership's arguments that Tennessee statutes making unenforceable leases of real property for certain purposes, such as sales of obscene material, and providing for the abatement of nuisances terminated or forfeited Pioneer's lease *ipso jure*.

The Cain Partnership now argues that this Court's rulings in this bankruptcy appeal, and the decision of the Bankruptcy Court, should be vacated because neither court ever had subject-matter jurisdiction. The Cain Partnership's argument is that Pioneer's claim of a leasehold interest is a chose in action, that The Cain Partnership had and continues to have a "substantial meritorious" defense against this claim of a leasehold interest, and that Pioneer's claim of a leasehold interest was therefore not property of Pioneer's bankruptcy estate.

The grant of jurisdiction in 28 U.S.C. § 1334(b) is a grant of jurisdiction to United States district courts of all civil proceedings arising under the Bankruptcy Code, or arising in or related to cases under the Bankruptcy Code. It is stated in § 1334(d), "The district court in which a case under [the Bankruptcy Code] is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate."

The provisions regarding the reference by the district courts

of bankruptcy cases and of "all proceedings arising under [the Bankruptcy Code] or arising in or related to a case under [the Bankruptcy Code]" to the bankruptcy courts are found in 28 U.S.C. § 157. "Core proceedings" in which bankruptcy courts may enter final, appealable orders and judgments, as opposed to proposed findings of fact and conclusions of law, include "motions to terminate, annul, or modify the automatic stay" and "orders approving the use or lease of property, including the use of cash collateral." 28 U.S.C. § 157(b)(2)(G) and (M). This case was initiated in part by The Cain Partnership's motion for relief from the 11 U.S.C. § 362 automatic stay, on the ground that it was entitled to recover possession of the deminsed premises for one or more prepetition breaches of Pioneer's lease obligations. As for the characterization of this case as a core proceeding to the extent that it involved the Bankruptcy Court's ruling on Pioneer's motion to assume the lease in controversy, § 365 of the Bankruptcy Code, 11 U.S.C. § 365, provides clearly for bankrupts' assumptions of unexpired leases, with bankruptcy court approval.

Section 541(a)(1) of the Bankruptcy Code, 11 U.S.C. § 541(a)(1), defines property of a bankruptcy estate as "all legal or equitable interests of the debtor in property as of the commencement of the case," with certain exceptions. One of these exceptions, in 11 U.S.C. § 541(b)(2), is for "any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case." The clear implication of this exception, read in the context of the broad, general definition of property of the estate, is that the interest of a debtor as a lessee under a lease of nonresidential real property which has not terminated at the expiration of its stated term is property of that debtor's bankruptcy estate. Therefore, in ruling that the lease in controversy in this case was not terminated or

forfeited prepetition, both the Bankruptcy Court below and this Court implicitly and necessarily ruled on the jurisdictional issue now raised by The Cain Partnership. Whether this lease had been terminated or forfeited prepetition was an issue of jurisdictional fact as well as an issue presented by the parties' opposing motions for relief from the automatic stay and for approval of the assumption of the unexpired lease.

The Cain Partnership's reliance upon *In re F & T Contractors, Inc.*, 718 F.2d 171 (6th Cir. 1983), requires a misreading of the Court of Appeals' opinion in that case which is so great that this Court must wonder whether the Rule 60(b)(4) motion under consideration is frivolous. First, *F & T Contractors* arose under the former Bankruptcy Act, not the Bankruptcy Code, and the jurisdictional issue in that case was presented under 11 U.S.C. § 11(a)(7), now superseded. Second, one ground of the decision in *F & T Contractors* that the bankruptcy court did not have jurisdiction of the debtor's counterclaim against the Federal Deposit Insurance Corporation in its capacity as the receiver of a failed State bank was that claims against the Federal Deposit Insurance Corporation in its capacity as the receiver of a failed State bank must be presented to the State court in which the receivership was initiated, and are specifically excluded from the scope of federal question subject-matter jurisdiction created in 12 U.S.C. § 1819 Fourth. This portion of the Court of Appeals' decision arguably renders its alternative decision concerning the bankruptcy court's jurisdiction of this counterclaim under the Bankruptcy Act *dictum*.

Third, the Court of Appeals' decision in *F & T Contractors* concerning the bankruptcy court's lack of bankruptcy jurisdiction of the debtor's counterclaim against the Federal Deposit Insurance Corporation in its capacity as the receiver of a failed State bank rests upon several distinctive facts. The claim of the debtor, a contractor, against the Federal Deposit Insuance Corporation was premised upon the allegedly wrongful concallation of several letters of credit by the receiver after the issuing bank was placed in receivership. However, the debtor was not the customer of the issuing bank

with respect to these letters of credit; the letters were issued at the request of an affiliate of the debtor, a developer. The receiver was alleged to have wrongfully withheld collateral which had been given to secure the obligations underlying the letters of credit, but this real property collateral was owned by another affiliate of the debtor. The debtor's only connection with the letters of credit was that it had cosigned mortgage notes made to the issuing bank in exchange for the issuance of the letters of credit. Therefore, the only property related to this case which was in the custody or possession of the debtor was its naked chose in action against the receiver; the debtor did not have custody or possession of either the cancelled letters of credit or the collateral given to the issuing bank, and was not entitled to custody or possession of either of these.

This is obviously a far cry from a commercial lease of premises which are in the custody and possession of the debtor at the time of the commencement of the debtor's case in bankruptcy. This Court finds that the Bankruptcy Court below had jurisdiction to hear and to decide the contested matter created by the parties' opposing motions for relief from the automatic stay and for approval of the assumption of an unexpired lease, and that this Court has jurisdiction under 28 U.S.C. § 158(a) to hear and to decide this bankruptcy appeal. The Court will accordingly deny The Cain Partnership's Rule 60(b)(4) motion.

ENTER:

/s/ Leon Jordan
United States District Judge

APPENDIX K

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

NO. CIV-3-89-0827

In re PIONEER INVESTMENT SERVICES COMPANY,
Debtor-in-Possession.

THE CAIN PARTNERSHIP, LTD.,
Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY, et al.,
Appellees.

ORDER
(Filed November 6, 1990)

For the reasons stated in the Memorandum Opinion filed simultaneously with this Order, the Court finds the Fed. R. Civ. P. 60(b)(4) motion [doc. 36] of The Cain Partnership, Ltd. to vacate this Court's Orders entered previously in this bankruptcy appeal not well taken, and it is DENIED.

ENTER:

/s/ LEON JORDAN
United States District Judge

APPENDIX L

No. 90-5766

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE CAIN PARTNERSHIP, LTD.,
Plaintiff-Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK, FIRST NATIONAL BANK OF LOUISVILLE: FIRST TENNESSEE BANK,
Defendants-Appellees.

ORDER
(Filed December 12, 1990)

BEFORE: MARTIN and NELSON, Circuit Judges; and PECK, Senior Circuit Judge.

Plaintiff, Cain Partnership, Ltd., appeals the district court's judgment affirming the bankruptcy court's order denying a motion by the plaintiff for relief from the automatic stay imposed by 11 U.S.C. § 362 and granting a motion by the debtor-in-possession, Pioneer Investment Services Company, to assume an unexpired lease. Plaintiff now moves to hold the appeal in abeyance and to remand the case to the district court and the bankruptcy court for ruling on plaintiff's motions to vacate judgment. The defendants have responded.

The plaintiff's notice of appeal was filed on June 11, 1990. On October 5, 1990, the plaintiff filed a motion to vacate judgment under Rule 60(b), Fed.R.Civ.P. in the bankruptcy court. On October 9, 1990, the plaintiff filed a motion to

vacate judgment under Rule 60(b) in the district court. The parties now advise this court that the district court and the bankruptcy court have denied the motion to vacate.

It is therefore ORDERED that the plaintiff's motion to hold the appeal in abeyance and to remand this case is denied as moot.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

APPENDIX M

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re PIONEER INVESTMENT SERVICES COMPANY,
Debtor,

THE CAIN PARTNERSHIP, LTD.,
Plaintiff-Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK
Defendants-Appellees.

ORDER
(Filed January 16, 1991)

The court having determined that consolidation of the above causes for purposes of submission only is appropriate,

It is ORDERED that the causes be and they hereby are consolidated for the purpose stated above.

ENTERED PURSUANT TO RULE 8(b), RULES OF THE SIXTH CIRCUIT.

/s/ Leonard Green, Clerk

APPENDIX N

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHERN DIVISION

NO. CIV-3-90-0857

In re PIONEER INVESTMENT SERVICES COMPANY, a/k/a PREMIERE RESTAURANT INVESTMENT COMPANY,

Debtor.

THE CAIN PARTNERSHIP, LTD.,

Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY,

Appellee.

ORDER

(Filed January 23, 1991)

In light of the briefing schedule imposed upon the appellant by Bankruptcy Rule 8009, the Court will consider the appellant's motion to hold this bankruptcy appeal in abeyance [doc. 2] before the expiration of the period allowed by L.R. 10.1, E.D. Tenn. The Court finds this motion well taken, and it is **GRANTED.** Neither party will be required to file briefs in this case until the further order of this Court. The appellant is **ORDERED** to advise the Court as soon as possible of a decision by the Court of Appeals for the Sixth Circuit in a related case, No. 90-6578.

ENTER:

/s/ LEON JORDAN
United States District Judge

APPENDIX O

[LETTERHEAD OF UNITED STATES COURT OF APPEALS SIXTH CIRCUIT]

August 21, 1991

Larry E. Parrish, Esq.
Parrish, Shaw & Brandon
6075 Poplar Avenue
Suite 400 The Crescent Center
Memphis, TN 38119

RE: 90-6578: 90-5766
Cain Partnership Ltd vs. Pioneer Investment
District Court No. 89-00827

Dear Mr. Parrish:

This letter is to advise that the panel assigned to this case has granted your motion to supplement the record has been granted.

Very truly yours,
Leonard Green, Clerk

/s/ YVONNE HENDERSON
Deputy Clerk

cc:
Thomas R. Stinnett Jr.
William R. O'Bryan Jr.
Craig J. Donaldson

APPENDIX P

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 90-6578

In re: PIONEER INVESTMENT SERVICES COMPANY,
Debtor-In-Possession,

THE CAIN PARTNERSHIP, LTD.,
Plaintiff-Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK,
Defendants-Appellees.

APPELLANT'S SUGGESTION TO SUPPLEMENT RECORD ON APPEAL BY INCLUSION OF AN OMITTED PART OF THE RECORD BELOW
(Filed August 13, 1991)

COMES NOW The Cain Partnership, Ltd., appellant, pursuant to *Federal Rules of Appellate Procedure*, Rule 10(e), and suggests that this court direct that a supplement to the record on appeal be certified and transmitted by the clerk of the district court below to this court.

More particularly, appellant notes, in Appellant's Brief, page 5, that appellant filed, in the bankruptcy court below, a motion to vacate based on *Federal Rules of Civil Procedure*, Rule 60(b)(4). As a result of the aforesaid motion to vacate, the bankruptcy court conducted an open court hearing after

which a transcript thereof was prepared and filed as part of the record below.

In light of questions raised by the court at the oral argument before this court, on August 8, 1991, appellant suggests that the following portion of the aforesaid transcript be included in the record on appeal commencing at page 11, line 6 thereof through page 11, line 16; page 13, line 18 thereof through page 14, line 24; page 19, line 15 thereof through page 22 line 11 thereof as follows:

> MR. PARRISH: . . . [A]nd I would suggest that at any time — well, the appeal that's pending now from Your Honor's September 15 order has as its primary force and effect a determination as to whether this leasehold was or was not property. I understand Your Honor's read that.
>
> THE COURT: Is that not the thrust of both these motions?
>
> * * *
>
> MR. PARRISH: . . . [W]hat I'm really saying is that the issue as to whether or not it was property was not addressable by the Court and the Court addressed it, that is, I'm way back behind whether the Court was right or wrong. The Court could be 100 percent right about what it ruled in its September 15th order with respect to termination clauses and all those things and still be required, I respectfully say and according to my reading of the law, to dismiss the order, because it went beyond what it had the power to address. And so I'm not asking to re-address it or to look at it again and see what you ruled was right or wrong with respect to termination clauses and other things, because to me and my reading of the law at this time is that that is all totally immaterial whether you were right or whether you were wrong when you ruled on September 15.
>
> THE COURT: Inherent in my ruling is finding of jurisdiction, is it not?

MR. PARRISH: Well, inherent in your ruling. Obviously, if the Court had concluded or decided it didn't have jurisdiction, it wouldn't have gone past the first paragraph, and so it is inherent. . . .

THE COURT: Well, the thrust of your argument was that the lease was terminated, and I found it was not terminated, and you're not accepting that, so you're here again wanting to re-litigate that termination issue. I've litigated it. Is that not the basis of these motions?

* * *

THE COURT: Mr. Parrish, do you want to respond briefly?

MR. PARRISH: With respect to the contention that the statutes say what they say, Mr. Donaldson still refuses to address the point that while property — what property — how broad the definition of property is in 541 does not resolve whether a particular thing is or is not property, it must be resolved by state law.

THE COURT: I've resolved it. Did I not resolve it?

MR. PARRISH: Yes, but it's the partnership's position that the law does not allow this Court to refer to the state law. That must be done in some other forum, not this forum. It's not a matter of — yes, it is clear Your Honor did do that and did refer to state law and did, based on state law, make a determination that this was property, but all of that is what the partnership claims the Court could not do.

* * *

THE COURT: Have you addressed that before the Sixth Circuit?

MR. PARRISH: In the motion that we filed, yes, and the Sixth Circuit is now holding its case in abeyance awaiting the determination of the motion that has been filed before the Sixth Circuit on the issue of threshold jurisdiction of the Bankruptcy Court, and so that is pending. Yes, that has been addressed.

. . . [I] filed a motion on the 10th of October, if I'm not mistaken, asking the Sixth Circuit to provisionally remand the case because of the issue of jurisdiction . . . and received a letter back, . . ., which is dated October 11, I believe, maybe the 10th, saying that the case is held in abeyance pending the outcome of the motion filed by the partnership before the Sixth Circuit.

* * *

THE COURT: You have raised these same issues before the Sixth Circuit?

MR. PARRISH: I've raised these same issues before the District Court, before the Sixth Circuit, and before this Court in successive motions. . . .

THE COURT: Well, why is not the Sixth Circuit the appropriate authority to rule on all of this?

MR. PARRISH: The Sixth Circuit . . . is an appropriate authority, but it's not the exclusive appropriate authority and the issues are — that are raised on Pages 32 and 33 of the reply brief that I filed are very real issues . . . and the one who is the appellant has much greater burdens, . . . And if the partnership is right and there was no jurisdiction here, to force the partnership to bear those risks during the appellate process, I suggest, is just inconsistent with justice.

THE COURT: All right. I'm going to recess until ten o'clock. I'm going to resolve these matters.

Respectfully submitted,

LARRY E. PARRISH, P.C.
Attorneys for Appellant

By: /s/ LARRY E. PARRISH
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CERTIFICATE OF SERVICE

This is to certify that the foregoing was served upon the opposing counsel by placing a true and exact copy of same in the United States mail, postage prepaid, this 13th day of August 1991, addressed to the following:

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/s/ LARRY E. PARRISH

APPENDIX Q

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 90-5766

In re: PIONEER INVESTMENT SERVICES COMPANY,

Debtor-In-Possession,

THE CAIN PARTNERSHIP, LTD.,

Plaintiff-Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK,

Defendants-Appellees.

ORDER
(Filed February 1, 1991)

BEFORE: KEITH and MILBURN, Circuit Judges; and CONTIE, Senior Circuit Judge.

The plaintiff appeals the district court judgment affirming the bankruptcy court order denying plaintiff's motion for relief from the automatic stay imposed by 11 U.S.C. § 362 and granting a motion by the debtor-in-possession, Pioneer Investment Services Company, to assume an unexpired lease in which the plaintiff claims an interest. The plaintiff now moves to strike and expunge the defendants' December 3, 1990, response to plaintiff's motion to hold its appeal in abeyance and to remand the case to the district court and

bankruptcy court for ruling on plaintiff's motions to vacate judgment. The plaintiff also moves for a stay pending appeal. The defendants have responded in opposition to the plaintiff's motion for a stay. The plaintiff has filed a reply.

By order entered on December 12, 1990, this Court denied plaintiff's motion to hold the appeal in abeyance and to remand the case on the grounds that plaintiff's motion was moot. For the reasons set forth in the December 12 Order, plaintiff's motion to strike and expunge the defendant's December 3 response is also moot.

The factors regulating whether a stay pending appeal should issue are: 1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; 2) whether the applicant will be irreparably injured absent a stay; 3) whether issuance of the stay will substantially injure the other interested parties; and 4) where the public interest lies. *Hilton* v. *Braunskill*, 481 U.S. 770, 776 (1987). Upon review and consideration of the documents before the Court, we conclude that the defendant has not satisfied the criteria for a stay pending appeal.

It is therefore ORDERED that the motion to strike and expunge defendant's December 3 response is denied as moot and the motion for a stay pending appeal is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Clerk

APPENDIX R

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 90-5766

In re: PIONEER INVESTMENT SERVICES COMPANY,

Debtor-In-Possession,

THE CAIN PARTNERSHIP, LTD.,

Plaintiff-Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK,

Defendants-Appellees.

ORDER
(Filed April 1, 1991)

BEFORE: MILBURN and BOGGS, Circuit Judges; and GILMORE, District Judge.*

The plaintiff appeals a district court judgment affirming a bankruptcy court order denying plaintiff's motion for relief from the automatic stay imposed by 11 U.S.C. § 362 and permitting the debtor to assume an unexpired lease for use of real property. The plaintiff now moves to certify questions of state law to the Tennessee Supreme Court. Upon review and con-

* The Honorable Horace W. Gilmore, U.S. District Judge for the Eastern District of Michigan, sitting by designation.

sideration, the court concludes that the plaintiff's motion presents issues more appropriately addressed by the panel assigned to determine this case upon the merits.

It is therefore ORDERED that the motion to certify questions of state law is referred to the hearing panel which will determine this case on the merits.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Clerk

APPENDIX S

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

NO. CIV-3-90-0852

In re PIONEER INVESTMENT SERVICES COMPANY,
a/k/a PREMIERE RESTAURANT
INVESTMENT COMPANY,

Debtor.

THE CAIN PARTNERSHIP, LTD.,

Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY,

Appellee.

NO. CIV-3-90-0857

In re PIONEER INVESTMENT SERVICES COMPANY,
a/k/a PREMIERE RESTAURANT
INVESTMENT COMPANY,

Debtor.

THE CAIN PARTNERSHIP, LTD.,

Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY,

Appellee.

ORDER
(Filed April 9, 1991)

The second of these bankruptcy appeals, No. CIV 3-90-0857 has been held in abeyance on the appellant's motion pending a decision by the Court of Appeals for the Sixth Circuit in a related case, No. 90-6578. The Court has assumed that the other appeal by the same appellant, No. CIV 3-90-0852, should be held in abeyance for the same period of time, and subject to the same conditions. The appellant is ORDERED to advise the Court in writing by June 28, 1991 of the status of the case pending before the Court of Appeals, and to advise whether proceedings in either or both of these bankruptcy appeals should continue to be stayed.

ENTER:

/s/ LEON JORDAN
United States District Judge

APPENDIX T

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

NO. CIV-3-90-0852

In re PIONEER INVESTMENT SERVICES COMPANY,
a/k/a PREMIERE RESTAURANT
INVESTMENT COMPANY,

Debtor.

THE CAIN PARTNERSHIP, LTD.,

Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY,

Appellee.

NO. CIV-3-90-0857

In re PIONEER INVESTMENT SERVICES COMPANY,
a/k/a PREMIERE RESTAURANT
INVESTMENT COMPANY,

Debtor.

THE CAIN PARTNERSHIP, LTD.,

Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY,

Appellee.

ORDER
(Filed July 3, 1991)

The Court is advised that a case related to these two bankruptcy appeals which is pending presently before the Court of Appeals for the Sixth Circuit, number 90-6578, has been set for oral argument on August 8, 1991. Therefore, proceedings in these bankruptcy appeals will continue to be STAYED. The appellant is ORDERED to advise the Court in writing by August 28, 1991 of the status of the case pending before the Court of Appeals, and to advise whether proceedings in either or both of these bankruptcy appeals should continue to be stayed.

ENTER:

/s/ LEON JORDAN
United States District Judge

APPENDIX U

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

NO. CIV-3-90-0852

In re PIONEER INVESTMENT SERVICES COMPANY,
a/k/a PREMIERE RESTAURANT
INVESTMENT COMPANY,

Debtor.

THE CAIN PARTNERSHIP, LTD.,

Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY,

Appellee.

NO. CIV-3-90-0857

In re PIONEER INVESTMENT SERVICES COMPANY,
a/k/a PREMIERE RESTAURANT
INVESTMENT COMPANY,

Debtor.

THE CAIN PARTNERSHIP, LTD.,

Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY,

Appellee.

ORDER
(Filed August 29, 1991)

The Court being advised that a case related to these two bankruptcy appeals which is pending presently before the Court of Appeals for the Sixth Circuit, No. 90-6578, remains pending, proceedings in these bankruptcy appeals will continue to be **STAYED.** The appellant is **ORDERED** to advise the Court in writing by Monday, December 30, 1991 of the status of the case pending before the Court of Appeals, and to advise whether proceedings in either or both of these bankruptcy appeals should continue to be stayed.

ENTER:

/s/ LEON JORDAN
United States District Judge

APPENDIX V

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nos. 90-5766/6578

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In Re: PIONEER INVESTMENT SERVICES COMPANY,
Debtor,

THE CAIN PARTNERSHIP, LTD.,
Plaintiff-Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY, FLEET NATIONAL BANK, FIRST NATIONAL BANK OF LOUISVILLE and FIRST TENNESSEE BANK NATIONAL ASSOCIATION,
Defendants-Appellees.

ON APPEAL from the United States District Court
for the Eastern District of Tennessee
(Decided and Filed September 18, 1991)

Before: KENNEDY and MILBURN, Circuit Judges;
ZATKOFF, District Judge.*

KENNEDY, Circuit Judge. Appellant appeals from the District Court's affirmance of the Bankruptcy Court's order denying appellant's motion for relief from an automatic stay

* The Honorable Lawrence P. Zatkoff, United States District Judge for the Eastern District of Michigan, sitting by designation.

and debtor's motion for approval of assumption of an unexpired lease. Two issues are presented to this Court: 1) whether the Bankruptcy Court and District Court had subject matter jurisdiction to adjudicate these motions; and 2) whether the Bankruptcy Court and District Court properly applied Tennessee law to the leasehold issues raised by appellant. For the following reasons, we **AFFIRM.**

I.

A.

On April 12, 1989, Pioneer Investment Services Company ("debtor" or "Pioneer") filed a voluntary petition in bankruptcy and became a debtor-in-possession. Included in its amended schedule of assets filed with the Bankruptcy Court was an unexpired lease of approximately 95.5 acres of nonresidential real property ("Colonial Lease") to which Cain Partnership, Ltd. ("Partnership" or "appellant") was a party. On May 18, 1989, Pioneer filed a motion in bankruptcy court to assume the Colonial Lease.

On May 25, 1989, the Partnership filed a motion to lift the automatic stay imposed pursuant to 11 U.S.C. § 362 so that the Partnership could repossess the real property subject to the Colonial Lease. The Partnership claimed that Pioneer had breached the lease prior to filing for bankruptcy resulting in the automatic termination of the lease and forfeiture of any right to use or any interest in the property. Fleet National Bank and First National Bank intervened in this proceeding.

On June 15, 1989, the Bankruptcy Court held proceedings on these motions. The Bankruptcy Court initially notified all parties that these were core proceedings. Each party claimed that they had a right to use the property subject to the Colonial Lease, and that such right was superior to the other party's right. The Bankruptcy Court issued an order on September 15, 1989, denying the Partnership's motion to lift the stay and granting debtor's motion to assume the Colonial Lease.

The Partnership appealed from this order to the District Court. On March 8, 1990, the District Court affirmed the

Bankruptcy Court's decision. The District Court subsequently denied the Partnership's motion for a rehearing.

On June 1, 1990, the Partnership appealed to this Court. During the pendency of this appeal, the Parnership represented to the Court in writing that "to Appellants' knowledge there are no issues with respect to jurisdiction." Attachment C to the Civil Appeal Pre-Argument Statement in Case No. 90-5766. Notwithstanding this assertion, the Partnership filed a motion entitled "Appellant's Motion To Hold Appeal In Abeyance And Remand For Disposition Of Motion To Vacate As Void The Order Appealed." This motion was filed pursuant to Federal Rules of Civil Procedure 60(b)(4) and raised for the first time the issue of whether the Bankruptcy Court and District Court had jurisdiction to adjudicate the issues raised by the parties.[1] This Court ordered the appeal held in abeyance awaiting disposition of the motion filed by the Partnership in the District Court.

The Partnership filed a motion in the District Court requesting that it vacate its order because it lacked subject matter jurisdiction to adjudicate the issues previously decided. The District Court denied this Motion. This Court then docketed the Partnership's appeal.

B.

The facts relevant to this appeal are not in dispute. The debtor became obligated under the Colonial Lease as a result of a series of assignments. The Colonial Lease, as executed between the original parties, provides: "This lease may be assigned or the leased premises may be sublet in whole or in part for any lawful purpose at the will of the Lessee. However, the Lessee shall remain liable to the Lessor for lease payment and payment of taxes." The lease agreement does

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[1] Rule 60(b) states in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void . . . .

not address default, forfeiture or remedies for breach, except for provision of attorney's fees if the Partnership were required to resort to legal action to enforce its rights under the lease agreement.

Rent and property taxes owed by Pioneer were paid from an escrow account pursuant to an agreement collateral to the lease. The agreement, executed by several parties including Valley Fidelity Bank and Trust Company ("Valley), obligated Valley to pay from the escrow account monthly installments of rent and all real property taxes for the property subject to the Colonial Lease. At all times relevant to this action, Pioneer maintained sufficient funds in the escrow account to satisfy these obligations. Valley, however, failed to pay real property tax obligations which arose prior to debtor's bankruptcy filing. On May 2, 1989, almost one month after debtor filed its bankruptcy petition, The Partnership paid the overdue tax obligations. Prior to these payments, the Partnership never gave notice to Pioneer that Valley had not paid the real estate taxes; nor did the Partnership ever request that Pioneer make these payments. At no time did the Partnership notify Pioneer or take any actions to indicate that the Colonial Lease was terminated.

II.

The Partnership first contends that the Bankruptcy Court lacked subject mater jurisdiction to hear and determine the issue raised in the parties' motions — whether debtor's prepetition breach automatically terminated the Colonial Lease — because it was a matter to be resolved solely by the application of state law. Appellant argues that the statutory grant of jurisdiction to bankruptcy courts over core proceedings is unconstitutional. Resolution of this issue requires a brief overview of the statutory development of the bankruptcy court's jurisdiction.

Under the Bankruptcy Act of 1898, proceedings in bankruptcy were summary, as opposed to plenary, in nature. *Cline* v. *Kaplan*, 323 U.S. 97 (1944). Bankruptcy courts "ha[d] the power to adjudicate summarily rights and claims

to property which [was] in the actual or constructive possession of the court." *Cline*, 323 U.S. at 98. Without such possession, and lacking consent of the adverse party to the jurisdiction of the bankruptcy court, the court did not have jurisdiction over a claim.

The enactment of the Bankruptcy Reform Act of 1978 (the "Code") eliminated the concept of actual or constructive possession of property as the primary basis for bankruptcy court jurisdiction. The Code granted the bankruptcy court all of the district court's bankruptcy jurisdiction. Thus, the bankruptcy court could hear and determine any issue arising in a bankruptcy case. This broad jurisdictional grant was subsequently declared unconstitutional by the Supreme Court. *See Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Congress sought to remedy this constitutional defect by passage of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"). The instant case is governed by the jurisdictional provisions of BAFJA.

Under the Code as amended by BAFJA, the district courts have original and exclusive jurisdiction over all title II cases. 28 U.S.C.A. § 1334(a) (West Supp. 1991). The district courts also have "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." *Id.* § 1334(b). A district court "may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." *Id.* § 157(a). Thus, the Code grants broad jurisdictional powers to Article III district courts, and these courts have discretion to exercise this jurisdiction or refer the case or proceeding to the bankruptcy courts. King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 Vand. L.Rev. 675, 678 (1985).

Section 157 establishes the jurisdictional limits of the bankruptcy court. Section 157(a) authorizes the district court to refer to the bankruptcy court "any or all cases under title 11 and any or all proceedings arising under title 11 or arising

in or related to a case under title 11 . . . ."[2] Section 157 distinguishes between "core" and "noncore" proceedings. *Compare* 28 U.S.C. § 157(b)(2) (enumerating a nonexhaustive list of core proceedings) *with id.* § 157(c)(1). Significant jurisdictional consequences flow from this distinction.

A bankruptcy court has jurisdiction to "hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 . . . ." *Id.* § 157(b)(1). This section gives bankruptcy judges authority to enter final orders in core proceedings. Included in section 157(b)(2)'s nonexhaustive list of proceedings which are considered core proceedings are "matters concerning the administration of the estate," *id.* § 157(B)(2)(A), "orders to turn over property of the estate," *id.* § 157(b)(2)(E), and "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship," *id.* § 157(b)(2)(O) — provisions relied upon by the Bankruptcy Court in the instant case to assert jurisdiction.

On the other hand, a bankruptcy court's jurisdiction and authority are more circumscribed in the context of noncore proceedings. Section 157(c)(1) does not permit a bankruptcy court to enter a final order as to a noncore proceeding, but states that the bankruptcy court is to "submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions." Notwithstanding this limitation, section 157(c)(2) permits a bankruptcy court to hear and determine a noncore proceeding if the parties consent.

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[2] The term "case" as used in the Code is a term of art and "comprises the Chapter 7, 9, 11 or 13 case that is commenced pursuant to section 301, 302, or 303 of the Bankruptcy Code by the filing of a 'petition,' another word of art." King, 38 Vand. L.Rev. at 676-77 (footnote omitted). Disputes that arise during the pendency of a case are referred to as "proceedings." Numerous proceedings may occur within a case.

"Under BAFJA, then, all bankruptcy jurisdiction is given in the first instance to the district court. Of the three types of proceedings, bankruptcy cases (cases seeking relief under title 11), core proceedings (proceedings within bankruptcy cases which seek the creation, recognition, determination, or adjudication of rights which do not exist independent of title 11 or the bankruptcy case) and related proceedings (proceedings which could have been brought in state court had there been no title 11 bankruptcy case filed) . . . , the bankruptcy court may hear and determine the first two in all instances; it may hear and report in the latter, although consent of the parties will permit it to hear and determine." *Acolyte Elec. Corp.* v. *City of New York*, 69 B.R. 155 (Bankr. E.D.N.Y. 1986).

The Bankruptcy Court and District Court construed the instant proceeding as a core proceeding. Although the instant proceeding is perhaps more properly characterized as a noncore but related proceeding because of the underlying issue involved,[3] we nevertheless conclude that the Bankruptcy Court had jurisdiction to hear and determine this proceeding even if it is noncore based on the consent of the parties.

This Court recently decided a case similar to the instant case. *In re Southern Indus. Banking Corp.*, 809 F.2d 329 (6th Cir. 1987). In *Southern Industrial*, the bankruptcy court asserted jurisdiction over a proceeding based on its status as a core proceeding. None of the parties contested this basis of jurisdiction. The bankruptcy court heard and determined the merits of the proceeding, and the losing party appealed to the district court arguing, *inter alia*, that the bankruptcy court acted outside its jurisdiction. The district court held that the dispute was a core proceeding and thus jurisdiction was proper. On appeal to this Court we concluded that the pro-

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[3] Appellant's motion is based on rights which could have been brought in state court had there been no title 11 bankruptcy case filed. In other words, the question as to the automatic termination of the lease upon breach did not involve any rights of either party granted by virtue of the filing of a title 11 bankruptcy case. Such a strict reading of "core" is necessitated by the Supreme Court's holding in *Marathon*.

ceeding was more properly characterized as a noncore proceeding, but jurisdiction was proper based on the parties' consent. We reasoned:

> Even if express consent has not been proven, we agree with recent cases in bankruptcy courts that have supported the notion that the absence of a timely objection to the bankruptcy court's jurisdiction constitutes an implied consent to the resolution of the controversy.

Id. at 331.

Similarly, in *In re Men's Sportswear, Inc.*, 834 F.2d 1134 (2d Cir. 1987), the Second Circuit concluded that the parties impliedly consented to the bankruptcy's jurisdiction over the proceeding when jurisdiction was not contested until after the decision of the bankruptcy court and after the appeal to the district court. The *Sportswear* court stated:

> We are cognizant that a court should not lightly infer from a litigant's conduct consent to have private state-created rights adjudicated by a non-Article III bankruptcy judge. Indeed, to do so would violate the spirit of *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) . . . . However . . . , Sasson's silence on the jurisdictional issue before both [the bankruptcy court] and the [district court] can only be construed as implied consent. . . . Sasson's protest at this stage in the litigation more closely resembles an afterthought than a bona fide objection.

Id. at 1138.

The actions of appellant amount to an implied consent to have the Bankruptcy Court hear and determine the instant noncore proceeding. In its written motion to lift the automatic stay, the Partnership denominated three issues for resolution, none of which questioned the jurisdiction of the Bankruptcy Court. Appellant did not protest jurisdiction at

any point in the proceeding before the Bankruptcy Court. Similarly, appellant failed to raise any objection to the jurisdiction of the Bankruptcy Court on appeal to the District Court.

In its notice of appeal to this Court, appellant represented that there were no issues with respect to jurisdiction. Notwithstanding this assertion, appellant subsequently raised the issue of jurisdiction. Thus, it was not until after an appeal had been filed with this Court, seventeen months after the initial motions were filed in Bankruptcy Court and after adjudication both by the Bankruptcy Court and by the District Court, that appellant first raised the issue of jurisdiction. Under these circumstances, we conclude that the Partnership impliedly, if not expressly, consented to the jurisdiction of the Bankruptcy Court to hear and determine this noncore but related proceeding.

The Partnership next contends that the Bankruptcy Court and District Court misapplied Tennessee law. The Partnership alleges four errors: 1) the District Court erred in affirming the Bankruptcy Court's decision that absent a specific provision to the contrary, breach of a commercial lease does not result in automatic termination under Tennessee law; 2) the District Court erred in affirming the Bankruptcy Court's decision that an unlawful use of a portion of a leased premises does not allow the lessor to terminate the lease; 3) the District Court erred in affirming the Bankruptcy Court's decision that the lease does not prohibit assignment; and 4) the District Court erred in affirming the Bankruptcy Court's decision that the transfer by Colonial to Orange Tee, a third party, of a portion of the leased property was an assignment.

Central to most of these allegations is the effect of breach upon a lease agreement that does not contain a termination or forfeiture clause. Relying primarily upon *Nashville Record Productions, Inc.* v. *Mr. Transmission, Inc.*, 623 S.W.2d 281 (Tenn. Ct. App. 1981), *Green* v. *Donnell*, 11 Tenn. App. 366, 371, *cert. denied*, 11 Tenn. App. 366 (Tenn. 1930), and *Planters Ins. Co.* v. *Diggs*, 67 Tenn. (8 Baxter) 563 (Tenn. 1876), the bankruptcy court and the district court determined

that Tennessee law requires affirmative conduct by a lessor in order to terminate a nonresidential lease which lacks a termination or forfeiture clause on the ground of breach. Accordingly, the courts below concluded that the Colonial Lease, which lacks a termination or forfeiture clause, was not terminated prior to the filing of Pioneer's bankruptcy petition because the Partnership took no action to terminate the lease. We think that the District Court properly interpreted and applied Tennessee law in reaching this conclusion.

The other issues raised by the Partnership are without merit.

III.

For the foregoing reasons, the decision of the District Court is **AFFIRMED.** In light of our disposition of this case, there is no need to certify the second issue raised by the Partnership to the Supreme Court of Tennessee. The motion to certify is denied.

APPENDIX W

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 90-5766: 90-6578

In re: PIONEER INVESTMENT SERVICES COMPANY,
Debtor,

THE CAIN PARTNERSHIP, LTD.,
Plaintiff-Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK NATIONAL ASSOCIATION,
Defendants-Appellees.

Before: Kennedy and Milburn, Circuit Judges; Zatkoff, District Judge

JUDGMENT
(Filed September 18, 1991)

ON APPEAL from the United States District Court for the Eastern District of Tennessee at Knoxville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

A True Copy.

Attest:

/s/ Diane Schaver, Deputy Clerk

APPENDIX X

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 90-5766/6578

In re: PIONEER INVESTMENT SERVICES COMPANY,

Debtor

THE CAIN PARTNERSHIP, LTD.,

Plaintiff-Appellant

v.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK,

Defendants-Appellees

ORDER
(Filed October 21, 1991)

BEFORE: KENNEDY and MILBURN, Circuit Judges; ZATKOFF, District Judge.*

Upon sua sponte consideration, it is ORDERED that the mandate in the above cause be and it hereby is RECALLED at the direction of the panel.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Clerk

* The Honorable Lawrence Zatkoff, District Judge for the Eastern District of Michigan, sitting by designation.

APPENDIX Y

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 90-5766/6578

In re: PIONEER INVESTMENT SERVICES COMPANY,

Debtor.

THE CAIN PARTNERSHIP, LTD.,

Plaintiff-Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; and FIRST TENNESSEE BANK NATIONAL ASSOCIATION,

Defendants-Appellees.

ORDER
(Filed October 28, 1991)

Before: KENNEDY and MILBURN, Circuit Judges; ZATKOFF, District Judge.*

It appearing to the Court that reliance on the pre-argument statement may conflict with advice given by the Court's pre-argument attorneys,

* The Honorable Lawrence P. Zatkoff, United States District Judge for the Eastern District of Michigan, sitting by designation.

IT IS HEREBY ORDERED that the following paragraph appearing in the slip opinion filed in this case on page 3 beginning "On June 1, 1990," be amended to read:

> On June 1, 1990, the Partnership appealed to this Court (90-5766). Its brief on that appeal raised no jurisdictional issue. The issue was first raised when the Partnership filed a motion entitled "Appellant's Motion To Hold Appeal In Abeyance And Remand For Disposition Of Motion To Vacate As Void The Order Appealed." This motion was filed pursuant to Federal Rules of Civil Procedure 60(b)(4) and raised for the first time the issue of whether the Bankruptcy Court and District Court had jurisdiction to adjudicate the issues raised by the parties. This Court ordered the appeal held in abeyance awaiting disposition of the motion filed by the Partnership in the District Court.

IT IS FURTHER ORDERED that the following language at the end of footnote 1 should be added: "The Rule 60(b) motion was filed in the District Court October 9, 1990."

IT IS FURTHER ORDERED that on page 9 of the slip opinion at the beginning of the last paragraph the first sentence should read:

> In its initial appeal to this Court, appellant raised no issues with respect to jurisdiction.

An amended opinion is attached.

ENTERED BY ORDER OF THE COURT

_____

Clerk

APPENDIX Z

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nos. 90-5766/6578

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In Re: PIONEER INVESTMENT SERVICES COMPANY,
Debtor,

THE CAIN PARTNERSHIP, LTD.,
Plaintiff-Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; and FIRST TENNESSEE BANK NATIONAL ASSOCIATION,
Defendants-Appellees.

ON APPEAL from the United States District Court
for the Eastern District of Tennessee
(Decided and Filed October 28, 1991)

AMENDED OPINION

Before: KENNEDY and MILBURN, Circuit Judges; ZATKOFF, District Judge.*

KENNEDY, Circuit Judge. Appellant appeals from the District Court's affirmance of the Bankruptcy Court's order

* The Honorable Lawrence P. Zatkoff, United States District Judge for the Eastern District of Michigan, sitting by designation.

denying appellant's motion for relief from an automatic stay and granting debtor's motion for approval of assumption of an unexpired lease. Two issues are presented to this Court: 1) whether the Bankruptcy Court and District Court had subject matter jurisdiction to adjudicate these motions; and 2) whether the Bankruptcy Court and District Court properly applied Tennessee law to the leasehold issues raised by appellant. For the Following reasons, we **AFFIRM.**

I.

A.

On April 12, 1989, Pioneer Investment Services Company ("debtor" or "Pioneer") filed a voluntary petition in bankruptcy and became a debtor-in-possession. Included in its amended schedule of assets filed with the Bankruptcy Court was an unexpired lease of approximately 95.5 acres of nonresidential real property ("Colonial Lease") to which Cain Partnership, Ltd. ("Partnership" or "appellant") was a party. On May 18, 1989, Pioneer filed a motion in bankruptcy court to assume the Colonial Lease.

On May 25, 1989, the Partnership filed a motion to lift the automatic stay imposed pursuant to 11 U.S.C. § 362 so that the Partnership could repossess the real property subject to the Colonial Lease. The Partnership claimed that Pioneer had breached the lease prior to filing for bankruptcy resulting in the automatic termination of the lease and forfeiture of any right to use or any interest in the property. Fleet National Bank and First National Bank intervened in this proceeding.

On June 15, 1989, the Bankruptcy Court held proceedings on these motions. The Bankruptcy Court initially notified all parties that these were core proceedings. Each party claimed that they had a right to use the property subject to the Colonial Lease, and that such right was superior to the other party's right. The Bankruptcy Court issued an order on September 15, 1989, denying the Partnership's motion to lift the stay and granting debtor's motion to assume the Colonial Lease.

The Partnership appealed from this order to the District Court. On March 8, 1990, the District Court affirmed the Bankruptcy Court's decision. The District Court subsequently denied the Partnership's motion for a rehearing.

On June 1, 1990, the Partnership appealed to this Court (90-5766). Its brief on that appeal raised no jurisdictional issue. The issue was first raised when the Partnership filed a motion entitled "Appeallant's Motion To Hold Appeal In Abeyance And Remand For Disposition Of Motion To Vacate As Void The Order Appealed." This motion was filed pursuant to Federal Rules of Civil Procedure 60(b)(4) and raised for the first time the issue of whether the Bankruptcy Court and District Court had jurisdiction to adjudicate the issues raised by the parties.[1] This Court ordered the appeal held in abeyance awaiting disposition of the motion filed by the Partnership in the District Court.

The Partnership filed a motion in the District Court requesting that it vacate its order because it lacked subject matter jurisdiction to adjudicate the issues previously decided. The District Court denied this Motion. This Court then docketed the Partnership's appeal.

B.

The facts relevant to this appeal are not in dispute. The debtor became obligated under the Colonial Lease as a result of a series of assignments. The Colonial Lease, as executed between the original parties, provides: "This lease may be assigned or the leased premises may be sublet in whole or in part for any lawful purpose at the will of the Lessee.

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[1] Rule 60(b) states in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void . . . .

The Rule 60(b) motion was filed in the District Court October 9, 1990.

However, the Lessee shall remain liable to the Lessor for lease payment and payment of taxes." The lease agreement does not address default, forfeiture or remedies for breach, except for provision of attorney's fees if the Partnership were required to resort to legal action to enforce its rights under the lease agreement.

Rent and property taxes owed by Pioneer were paid from an escrow account pursuant to an agreement collateral to the lease. The agreement, executed by several parties including Valley Fidelity Bank and Trust Company ("Valley), obligated Valley to pay from the escrow account monthly installments of rent and all real property taxes for the property subject to the Colonial Lease. At all times relevant to this action, Pioneer maintained sufficient funds in the escrow account to satisfy these obligations. Valley, however, failed to pay real property tax obligations which arose prior to debtor's bankruptcy filing. On May 2, 1989, almost one month after debtor filed its bankruptcy petition, the Partnership paid the overdue tax obligations. Prior to these payments, the Partnership never gave notice to Pioneer that Valley had not paid the real estate taxes; nor did the Partnership ever request that Pioneer make these payments. At no time did the Partnership notify Pioneer or take any actions to indicate that the Colonial Lease was terminated.

II.

The Partnership first contends that the Bankruptcy Court lacked subject mater jurisdiction to hear and determine the issue raised in the parties' motions — whether debtor's prepetition breach automatically terminated the Colonial Lease — because it was a matter to be resolved solely by the application of state law. Appellant argues that the statutory grant of jurisdiction to bankruptcy courts over core proceedings is unconstitutional. Resolution of this issue requires a brief overview of the stautotry development of the bankruptcy court's jurisdiction.

Under the Bankruptcy Act of 1898, proceedings in bankruptcy were summary, as opposed to plenary, in nature. *Cline*

v. *Kaplan*, 323 U.S. of 97 (1944). Bankruptcy courts "ha[d] the power to adjudicate summarily rights and claims to property which [was] in the actual or constructive possession of the court." *Cline*, 323 U.S. at 98. Without such possession, and lacking consent of the adverse party to the jurisdiction of the bankruptcy court, the court did not have jurisdiction over a claim.

The enactment of the Bankruptcy Reform Act of 1978 (the "Code") eliminated the concept of actual or constructive possession of property as the primary basis for bankruptcy court jurisdiction. The Code granted the bankruptcy court all of the district court's bankruptcy jurisdiction. Thus, the bankruptcy court could hear and determine any issue arising in a bankruptcy case. This broad jurisdictional grant was subsequently declared unconstitutional by the Supreme Court. *See Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Congress sought to remedy this constitutional defect by passage of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"). The instant case is governed by the jurisdictional provisions of BAFJA.

Under the Code as amended by BAFJA, the district courts have original and exclusive jurisdiction over all title II cases. 28 U.S.C.A. § 1334(a) (West Supp. 1991). The district courts also have "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." *Id.* § 1334(b). A district court "may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." *Id.* § 157(a). Thus, the Code grants broad jurisdictional powers to Article III district courts, and these courts have discretion to exercise this jurisdiction or refer the case or proceeding to the bankruptcy courts. King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 Vand. L.R. 675, 678 (1985).

Section 157 establishes the jurisdictional limits of the bankruptcy court. Section 157(a) authorizes the district court to refer to the bankruptcy court "any or all cases under title 11

and any or all proceedings arising under title 11 or arising in or related to a case under title 11 . . . ."[2] Section 157 distinguishes between 'core" and "noncore" proceedings. *Compare* 28 U.S.C. § 157(b)(2) (enumerating a nonexhaustive list of core proceedings) *with id.* § 157(c)(1). Significant jurisdictional consequences flow from this distinction.

A bankruptcy court has jurisdiction to "hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 . . . ." *Id.* § 157(b)(1). This section gives bankruptcy judges authority to enter final orders in core proceedings. Included in section 157(b)(2)'s nonexhaustive list of proceedings which are considered core proceedings are "matters concerning the administration of the estate," *id.* § 157(B)(2)(A), "orders to turn over property of the estate," *id.* § 157(b)(2)(E), and "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship," *id.* § 157(b)(2)(O) — provisions relied upon by the Bankruptcy Court in the instant case to assert jurisdiction.

On the other hand, a bankruptcy court's jurisdiction and authority are more circumscribed in the context of noncore proceedings. Section 157(c)(1) does not permit a bankruptcy court to enter a final order as to a noncore proceeding, but states that the bankruptcy court is to "submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions." Notwithstanding this limitation, sec-

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[2] The term "case" as used in the Code is a term of art and "comprises the Chapter 7, 9, 11 or 13 case that is commenced pursuant to section 301, 302, or 303 of the Bankruptcy Code by the filing of a 'petition,' another word of art." King, 38 Vand. L.R. at 676-77 (footnote omitted). Disputes that arise during the pendency of a case are referred to as "proceedings." Numerous proceedings may occur within a case.

tion 157(c)(2) permits a bankruptcy court to hear and determine a noncore proceeding if the parties consent.

"Under BAFJA, then, all bankruptcy jurisdiction is given in the first instance to the district court. Of the three types of proceedings, bankruptcy cases (cases seeking relief under title 11), core proceedings (proceedings within bankruptcy cases which seek the creation, recognition, determination, or adjudication of rights which do not exist independent of title 11 or the bankruptcy case) and related proceedings (proceedings which could have been brought in state court had there been no title 11 bankruptcy case filed) . . . , the bankruptcy court may hear and determine the first two in all instances; it may hear and report in the latter, although consent of the parties will permit it to hear and determine." *Acolyte Elec. Corp.* v. *City of New York*, 69 B.R. 155 (Bankr. E.D.N.Y. 1986).

The Bankruptcy Court and District Court construed the instant proceeding as a core proceeding. Although the instant proceeding is perhaps more properly characterized as a noncore but related proceeding because of the underlying issue involved,[3] we nevertheless conclude that the Bankruptcy Court had jurisdiction to hear and determine this proceeding even if it is noncore based on the consent of the parties.

This Court recently decided a case similar to the instant case. *In re Southern Indus. Banking Corp.*, 809 F.2d 329 (6th Cir. 1987). In *Southern Industrial*, the bankruptcy court asserted jurisdiction over a proceeding based on its status as a core proceeding. None of the parties contested this basis of jurisdiction. The bankruptcy court heard and determined the merits of the proceeding, and the losing party appealed to the district court arguing, *inter alia*, that the bankruptcy court acted outside its jurisdiction. The district court held that the

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[3] Appellant's motion is based on rights which could have been brought in state court had there been no title 11 bankruptcy case filed. In other words, the question as to the automatic termination of the lease upon breach did not involve any rights of either party granted by virtue of the filing of a title 11 bankruptcy case. Such a strict reading of "core" is necessitated by the Supreme Court's holding in *Marathon*.

dispute was a core proceeding and thus jurisdiction was proper. On appeal to this Court we concluded that the proceeding was more properly characterized as a noncore proceeding, but jurisdiction was proper based on the parties' consent. We reasoned:

> Even if express consent has not been proven, we agree with recent cases in bankruptcy courts that have supported the notion that the absence of a timely objection to the bankruptcy court's jurisdiction constitutes an implied consent to the resolution of the controversy.

Id. at 331.

Similarly, in *In re Men's Sportswear, Inc.*, 834 F.2d 1134 (2d Cir. 1987), the Second Circuit concluded that the parties impliedly consented to the bankruptcy's jurisdiction over the proceeding when jurisdiction was not contested until after the decision of the bankruptcy court and after the appeal to the district court. The *Sportswear* court stated:

> We are cognizant that a court should not lightly infer from a litigant's conduct consent to have private state-created rights adjudicated by a non-Article III bankruptcy judge. Indeed, to do so would violate the spirit of *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) . . . . However . . . , Sasson's silence on the jurisdictional issue before both [the bankruptcy court] and the [district court] can only be construed as implied consent. . . . Sasson's protest at this stage in the litigation more closely resembles an afterthought than a bona fide objection.

Id. at 1138.

The actions of appellant amount to an implied consent to have the Bankruptcy Court hear and determine the instant noncore proceeding. In its written motion to lift the automatic stay, the Partnership denominated three issues for resolution, none of which questioned the jurisdiction of the Bankruptcy

Court. Appellant did not protest jurisdiction at any point in the proceeding before the Bankruptcy Court. Similarly, appellant failed to raise any objection to the jurisdiction of the Bankruptcy Court on appeal to the District Court.

In its initial appeal to this Court, appellant raised no issues with respect to jurisdiction. Notwithstanding this assertion, appellant subsequently raised the issue of jurisdiction. Thus, it was not until after an appeal had been filed with this Court, seventeen months after the initial motions were filed in Bankruptcy Court and after adjudication both by the Bankruptcy Court and by the District Court, that appellant first raised the issue of jurisdiction. Under these circumstances, we conclude that the Partnership impliedly, if not expressly, consented to the jurisdiction of the Bankruptcy Court to hear and determine this noncore but related proceeding.

The Partnership next contends that the Bankruptcy Court and District Court misapplied Tennessee law. The Partnership alleges four errors: 1) the District Court erred in affirming the Bankruptcy Court's decision that absent a specific provision to the contrary, breach of a commercial lease does not result in automatic termination under Tennessee law; 2) the District Court erred in affirming the Bankruptcy Court's decision that an unlawful use of a portion of a leased premises does not allow the lessor to terminate the lease; 3) the District Court erred in affirming the Bankruptcy Court's decision that the lease does not prohibit assignment; and 4) the District Court erred in affirming the Bankruptcy Court's decision that the transfer by Colonial to Orange Tee, a third party, of a portion of the leased property was an assignment.

Central to most of these allegations is the effect of breach upon a lease agreement that does not contain a termination or forfeiture clause. Relying primarily upon *Nashville Record Productions, Inc.* v. *Mr. Transmission, Inc.*, 623 S.W.2d 281 (Tenn. Ct. App. 1981), *Green* v. *Donnell*, 11 Tenn. App. 366, 371, *cert. denied*, 11 Tenn. App. 366 (Tenn. 1930), and *Planters Ins. Co.* v. *Diggs*, 67 Tenn. (8 Baxter) 563 (Tenn. 1876), the bankruptcy court and the district court determined that Tennessee law requires affirmative conduct by a lessor in

order to terminate a nonresidential lease which lacks a termination or forfeiture clause on the ground of breach. Accordingly, the courts below concluded that the Colonial Lease, which lacks a termination or forfeiture clause, was not terminated prior to the filing of Pioneer's bankruptcy petition because the Partnership took no action to terminate the lease. We think that the District Court properly interpreted and applied Tennessee law in reaching this conclusion.

The other issues raised by the Partnership are without merit.

III.

For the foregoing reasons, the decision of the District Court is **AFFIRMED.** In light of the our disposition of this case, there is no need to certify the second issue raised by the Partnership to the Supreme Court of Tennessee. The motion to certify is denied.

APPENDIX AA

No: 90-5766: 90-6578

In re: PIONEER INVESTMENT SERVICES COMPANY,
Debtor in Possession.

THE CAIN PARTNERSHIP, LTD.,
Plaintiff-Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK: FIRST NATIONAL BANK OF LOUISVILLE: FIRST TENNESSEE BANK NATIONAL ASSOCIATION,
Defendants-Appellees.

Before: Kennedy and Milburn, Circuit Judges;
Zatkoff, District Judge

AMENDED JUDGMENT

(Filed October 28, 1991)

ON APPEAL from the United States District Court for the Eastern District of Tennessee at Knoxville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

A True Copy.

Attest:

/s/ Diane Schnur
Deputy Clerk

APPENDIX BB

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: PIONEER INVESTMENT SERVICES COMPANY,
Debtor in Possession.

THE CAIN PARTNERSHIP, LTD.,
Plaintiff-Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY, ET AL.,
Defendants-Appellees.

ORDER
(Filed December 19, 1991)

BEFORE: KENNEDY and MILBURN, Circuit Judges; and ZATKOFF,* United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

* Hon. Lawrence P. Zatkoff sitting by designation for the Eastern District of Michigan.

APPENDIX CC

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

NO. CIV-3-90-0857

In re: PIONEER INVESTMENT SERVICES,
a/k/a Premiere Restaurant Investment Company,

Debtor;

THE CAIN PARTNERSHIP, LTD.,

Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY,

Appellee.

ORDER
(Filed January 29, 1992)

All issues in this bankruptcy appeal (*see* the appellant's Bankruptcy Rule 8006 statement of the issues to be presented, item no. 16 in the record on appeal [doc. 1]), are governed by the decision of the Court of Appeals for the Sixth Circuit in *In re Pioneer Investment Services Company*, Nos. 90-5766/6578, amended slip opinion filed October 28, 1991. The Court finds that there is no just cause to continue to stay proceedings in this appeal, and finds also that briefing and argument on the issues presented would be redundant. The Court finds the appellant has not shown good cause [*see* docs. 7 and 8] why this appeal should not be dismissed.

It is therefore **ORDERED** that the order of the United

States Bankruptcy Court for the Eastern District of Tennessee filed October 31, 1990, denying the appellant's Bankruptcy Rule 9024 and Federal Rule of Civil Procedure 60(b)(4) motion to vacate the Bankruptcy Court's September 15, 1989 orders denying the appellant's motion to lift the automatic stay and granting the appellee's motion to assume a lease, *see* item no. 12 in the record on appeal, is **AFFIRMED** in all respects under Bankruptcy Rule 8013.

ENTER:

/s/ LEON JORDAN
United States District Judge

APPENDIX DD

SUPREME COURT OF THE UNITED STATES

No. A-638

The Cain Partnership, Ltd.,

Petitioner,

v.

Pioneer Investment Services Company, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including April 7, 1992.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 2nd
day of March, 1992.

APPENDIX EE

UNITED STATES CONSTITUTION

Article III, Section 1. Supreme Court and inferior courts — Judges and compensation.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Amendment V. Criminal actions — Provisions concerning — Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

§ 1334. Bankruptcy cases and proceedings.

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civill proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceedings arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the estate.

§ 157. Procedures.

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under tilte 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to —

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the

district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.